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Judicial Federalism and the Future of Federal Environmental Regulation

Jonathan H. Adler*

*ABSTRACT: This article assesses the current and likely impact of the Supreme Court's federalism cases on federal environmental regulation. As a result of this assessment, the article seeks to make four points: (1) Thus far, the Supreme Court's federalism cases have had a limited impact on federal regulation, as federal courts have not used these cases as a basis for limiting the reach of federal regulatory authority. (2) Notwithstanding this limited impact, the underlying logic of the Supreme Court's cases does pose a challenge for federal regulation, particularly in the Commerce Clause context. (3) The thrust of the federalism cases makes it likely that the Supreme Court will revisit the constitutional limitations on the Spending Clause, and this could have a substantial impact on federal environmental regulation, as some federal environmental provisions exceed even the highly deferential Spending Clause standard outlined in *South Dakota v. Dole*. (4) Judicially enforced limitations on federal regulatory authority do not necessarily translate into limitations on environmental protection. The federal government will retain substantial—although not unlimited—authority to advance environmental protection. Where federal authority is constrained, state and local governments and non-governmental entities will retrain their ability to address many environmental concerns.*

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INTRODUCTION

From the New Deal through the 1980s the Supreme Court showed little interest in policing the division of state and federal power.¹ Beginning in the 1990s, however, the Court reasserted the importance of state sovereignty and enumerated powers, limiting the federal government's power, particularly over matters traditionally left in the hands of state and local governments. These accumulated federalism decisions put a multiple "whammy on congressional authority."² The federalist revival is arguably the most significant constitutional law development of the past fifteen years and may become the Rehnquist Court's most controversial legacy.³

The expansive reach of federal environmental regulation places it in the middle of the federalism debate.⁴ Environmental regulation arguably represents the most ambitious and far-reaching assertion of federal

1. For instance, the Supreme Court did not strike down a single federal statute for exceeding the scope of Congress's enumerated powers between 1936 and 1995. In 1976, the Supreme Court ruled 5-4 that Congress could not require state governments to pay state employees the minimum wage in *National League of Cities v. Usery*, 426 U.S. 833 (1976). Within a few years, however, the Court began to whittle away at the *National League of Cities* holding and overturned it in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). Of note, Justice Harry Blackmun provided the deciding vote in both cases.

2. Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1722 (2002).

3. See, e.g., JOHN T. NOONAN, JR., *NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES* 1-14 (2002) (describing and lamenting the revival of federalism); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1052-53 (2001) (characterizing the accumulated federalism decisions as a "constitutional revolution"); Erwin Chemerinsky, *Protecting the Spending Power*, 4 CHAP. L. REV. 89, 105 (2001) ("[T]he five most conservative Justices on the Court have engaged in great judicial activism in limiting Congress's powers, reviving the Tenth Amendment, and expanding sovereign immunity."); Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7, 7 (2001) ("[T]here has been a revolution with regard to the structure of American government because of the Supreme Court decisions in the last few years regarding federalism."); Jesse H. Choper & John C. Yoo, *The Scope of the Commerce Clause after Morrison*, 25 OKLA. CITY U. L. REV. 843, 854 (2000) ("[S]hould the current ideological majority of the Court continue, we may be entering an era where federal powers will continue to be restricted."); David Freeman Engstrom, *Drawing Lines Between Chevron and Pennhurst: A Functional Analysis of the Spending Power, Federalism and the Administrative State*, 82 TEX. L. REV. 1197, 1198 (2004) (noting the Rehnquist Court's "revolution in federal-state relations"); Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 12 (2003) ("[I]t is a hallmark—and perhaps the legacy—of the Rehnquist Court to have brought back to the public-law table the notion that the Constitution is a charter for a government of limited and enumerated powers."); Linda Greenhouse, *For a Supreme Court Graybeard, States' Rights Can Do No Wrong*, N.Y. TIMES, March 16, 2003, § 4, at 5 ("The court has followed [Rehnquist's] lead in a stunning series of federalism decisions that have curbed the power of Congress to bind the states to the full reach of federal law.").

4. As Professor Percival notes, "As a result of the Rehnquist Court's 'new federalism,' constitutional challenges to federal environmental regulations are now being raised with regularity." Robert V. Percival, *"Greening" the Constitution—Harmonizing Environmental and Constitutional Values*, 32 ENVTL. L. 809, 840 (2002).

regulatory authority. The very premise of much environmental regulation is that ubiquitous ecological interconnections require broad, if not all-encompassing, federal regulation.⁵ This premise is contrary to that of a federal government of limited and enumerated powers.⁶ Due to their expansive scope, environmental statutes are particularly vulnerable to challenge on federalism grounds, a fact noted with great concern by Justice Stevens, among others.⁷ Even though federal environmental regulation adopts a “cooperative federalism” model, the federal government sets most environmental priorities, imposes far-reaching restrictions on potentially environmentally destructive behavior, and directs much state effort. Insofar as a judicially enforced federalism constrains federal authority, it could have a significant impact on federal environmental regulation. Some even suggest that the revival of federalism has “the potential to undo the foundation of modern environmental law.”⁸ Yet federalist limits on federal regulatory authority need not undermine the cause of environmental protection.

5. See generally MICHAEL S. GREVE, *THE DEMISE OF ENVIRONMENTALISM IN AMERICAN LAW* (1996).

6. David Orr, *The Constitution of Nature*, 17 CONSERVATION BIOLOGY 1478, 1481 (2003) (“Nature is a unified mosaic of ecosystems, functions and processes. Government, on the other hand, was conceived by the founders as a limited and fractured enterprise.”). Orr argues that there is a fundamental “mismatch between the way nature works in highly connected and interactive systems and the fragmentation of powers built into the Constitution.” *Id.* It would be a mistake, however, to assume that the Founders were unaware of broad economic and other interrelationships and did not consider whether such interconnections justified a greater centralization of government power. The existence of interstate externalities and interrelationships was “an oft-repeated axiom in the constitutional debates.” Robert G. Natelson, *The Enumerated Powers of States*, 3 NEV. L.J. 469, 490 (2003) (emphasis omitted). In other words, the decision to “fragment” government power horizontally (through separation of powers) and vertically (through federalism) was made *despite* the existence of such interrelationships. *Id.* at 492–93.

7. See, e.g., *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 175 (2001) (“Today, however, the Court takes an unfortunate step that needlessly weakens our principal safeguard against toxic water.”) (Stevens, J., dissenting); *Printz v. United States*, 521 U.S. 898, 960–61 (1997) (noting that the majority opinion ignores the importance of federal enactments such as the Clean Water Act, the Occupational Safety and Health Act, and the Resource Conservation and Recovery Act) (Stevens, J., dissenting); *Seminole Tribe v. Florida*, 517 U.S. 44, 77 (1996) (Stevens, J., dissenting) (noting that the majority opinion “prevents Congress from providing a federal forum for . . . environmental law, and the regulation of our vast national economy”); *Nat'l League of Cities v. Usery*, 426 U.S. 833, 856 (1976) (Blackmun, J., concurring) (noting that the majority decision “does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential”).

8. ENVTL. LAW INST., *ENDANGERED ENVIRONMENTAL LAWS PROGRAM BACKGROUND PAPER 1* (2003), http://www.endangeredlaws.org/downloads/background_paper_final.pdf (on file with the Iowa Law Review). The ELI paper characterizes federalism doctrines as “arcane legal theories, hostile to federal regulation.” *Id.* As constitutional doctrines, they “go to the very foundation of environmental and other kinds of laws, and address government’s ability to enact, implement, and enforce such laws in the first place.” *Id.* at 4. “Taken to the extreme, they have the potential to roll federal authority right back seventy years or more.” *Id.* at 6.

Part I provides a brief overview of the federal-state relationship in environmental policy, including the dominant regulatory paradigm of "cooperative federalism." Part II summarizes the two central strains in the Supreme Court's federalism jurisprudence: enumerated powers and state sovereignty. Part III documents the limited impact that federalism jurisprudence has had on federal environmental law to date, while noting some areas, particularly relating to the Commerce Clause, in which the logic of existing precedent suggests limitations on federal environmental regulatory authority. Part IV looks to potential federalism limits on the spending power and Congress's use of conditional spending to advance environmental goals. Whereas it is generally assumed that restrictions on the federal government's ability to regulate and fund environmental measures will inevitably retard environmental protection, Part V suggests that judicially enforced federalism need not have a substantial negative impact on environmental protection. To the contrary, there are environmental reasons to prefer a more robust federalism.

I. FEDERALISM AND ENVIRONMENTAL PROTECTION

Prior to the late 1960s, most environmental concerns were addressed at the state and local level, if they were addressed at all.⁹ The few federal regulatory measures adopted before that time largely focused on the conduct of the federal government itself, rather than private industry, let alone consumer behavior.¹⁰ A few laws addressed uniquely federal concerns, such as maintaining the navigability of interstate waters.¹¹ Beyond that, federal environmental efforts were non-regulatory and largely consisted of federal funding, research assistance, and the like.¹² At the same time, various

9. See Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1147–60 (1995) (discussing history of environmental protection prior to 1970).

10. *Id.* at 1158 ("To the extent that federal law was regulatory in character prior to 1970, the primary targets of environmental regulation were federal agencies rather than private industry.").

11. One of the earliest examples is the federal Rivers and Harbors Act of 1899, also known as the "Refuse Act." Rivers and Harbors Appropriations Act of 1899, ch. 425, 30 Stat. 1151 (codified as amended in scattered sections of 33 U.S.C.). While this statute could have been used to control at least some sources of water pollution, it was rarely invoked for this purpose. See Jonathan H. Adler, *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection*, 14 FORDHAM ENVTL. L.J. 89, 133–38 (2002). Indeed, it seems that federal agencies were satisfied so long as rivers were sufficiently clear of debris to be suitable for shipping. For instance, in 1957 the U.S. Army Corps of Engineers declared the Cuyahoga River in "exceptionally good" shape because none of the local shipping docks were obstructed, even though the water itself was quite polluted. See *Cuyahoga River Seen in Good Condition*, CLEVELAND PLAIN DEALER, March 28, 1957, at 19.

12. See, e.g., N. William Hines, *Nor Any Drop to Drink: Public Regulation of Water Quality; Part III: The Federal Effort*, 52 IOWA L. REV. 799 (1967) (detailing early federal efforts to protect water quality).

federal programs subsidized widespread environmental despoliation, typically in the name of development or economic progress.¹³ In the decades following the Second World War, environmental protection as it is now conceived was simply not a major public policy concern.¹⁴

Although some environmental measures were improving in the 1960s,¹⁵ there was widespread dissatisfaction with environmental progress. Throughout the decade, pressure grew for greater federal involvement in environmental concerns. As America became more affluent, the demand for environmental quality increased dramatically.¹⁶ At the same time, best-selling books popularized the notion that modern industrial activity posed a mortal environmental threat.¹⁷ A consensus developed in support of greater federal involvement in environmental matters.¹⁸ Beginning in 1969, Congress

13. See *infra* Part V.A.

14. This in no way diminishes the significant conservation efforts of the pre-war period. Many conservation groups, including the National Audubon Society, Izaak Walton League, Boone & Crockett Club, and the Sierra Club, were quite active during that time. See JONATHAN H. ADLER, *ENVIRONMENTALISM AT THE CROSSROADS: GREEN ACTIVISTS IN AMERICA* 1-7 (1995). Indeed, the first park ranger to be killed in the line of duty was employed by the National Audubon Society, not a government conservation agency. See FRANK GRAHAM, *THE AUDUBON ARK: A HISTORY OF THE NATIONAL AUDUBON SOCIETY* 52, 56 (1990). For more general background on the history of the American environmental movement, see generally AMERICAN ENVIRONMENTALISM: THE U.S. ENVIRONMENTAL MOVEMENT: 1970-1990 (Riley E. Dunlap & Angela G. Mertig eds., 1992); PHILIP SHABECOFF, *A FIERCE GREEN FIRE: THE AMERICAN ENVIRONMENTAL MOVEMENT* (1993); and THEODORE STEINBERG, *DOWN TO EARTH: NATURE'S ROLE IN AMERICAN HISTORY* (2002).

15. See *infra* notes 589-97 and accompanying text.

16. See RICHARD L. STROUP, *ECO-NOMICS: WHAT EVERYONE SHOULD KNOW ABOUT ECONOMICS AND THE ENVIRONMENT* 13-14 (2003) (summarizing research finding that willingness to pay for environmental protection increases with income); Jason Scott Johnston, *On the Market for Ecosystem Control*, 21 VA. ENVTL. L.J. 129, 146 (2002) ("There is abundant evidence that the demand for outdoor recreation and environmental amenities increases with national income."); Matthew E. Kahn & John G. Matsusaka, *Demand for Environmental Goods: Evidence from Voting Patterns on California Initiatives*, 40 J.L. & ECON. 137, 139 (1997) (noting that most environmental goods are normal goods for which demand rises with income); Patrick Low, *Trade and the Environment: What Worries the Developing Countries?*, 23 ENVTL. L. 705, 706 (1993) (noting that "the demand for improved environmental quality tends to rise with income"); Kenneth E. McConnell, *Income and the Demand for Environmental Quality*, 2 ENV'T. & DEV. ECON. 383, 385-86 (1997) (reporting on empirical evidence of an environmental Kuznets curve); Richard L. Stroup & Roger E. Meiners, *Introduction: The Toxic Liability Problem: Why Is It Too Large?*, in CUTTING GREEN TAPE: TOXIC POLLUTANTS, ENVIRONMENTAL REGULATION AND THE LAW 15 (Richard L. Stroup & Roger E. Meiners eds., 2000) ("Willingness to pay for environmental measures . . . is highly elastic with respect to income.").

Charitable giving in general is also elastic with personal income. See RICHARD B. MCKENZIE, *WHAT WENT RIGHT IN THE 1980s* 70 (1994) (noting that "[h]igher incomes lead to increased giving").

17. E.g., RACHEL CARSON, *THE SILENT SPRING* (1962); PAUL EHRLICH, *THE POPULATION BOMB* (1968); DONNELLA MEADOWS ET AL., *THE LIMITS TO GROWTH* (1972); VANISHING AIR: THE NADER REPORT ON AIR POLLUTION (John C. Esposito ed., 1970).

18. Part of this consensus was due to industry support for greater federal environmental regulation in order to create uniform national standards and discourage more stringent state

enacted a flurry of environmental statutes, including the National Environmental Policy Act;¹⁹ the Clean Air Act;²⁰ the Clean Water Act;²¹ the Endangered Species Act;²² the Federal Insecticide, Fungicide, and Rodenticide Act;²³ the Resource Conservation and Recovery Act;²⁴ the Safe Drinking Water Act;²⁵ and the Toxic Substances Control Act.²⁶ With the enactment of these statutes, the federal government assumed a major role in environmental protection.

Under several of the aforementioned environmental statutes, the federal government asserted broad authority to regulate activities that can affect environmental quality. For example, under the Clean Water Act, the federal government prohibits the addition of any pollutant, defined to include most foreign materials,²⁷ to any waters of the United States, including wetlands, without a permit.²⁸ The Endangered Species Act bars private activities that kill, capture, or otherwise "harm" any animal species listed as endangered by the Fish and Wildlife Service, including those activities that do no more than modify existing species habitat on private land.²⁹ Under the Clean Air Act, the Environmental Protection Agency regulates the chemical composition of gasoline³⁰ and diesel fuel,³¹ the design

regulation. This was particularly so in the case of air pollution. *See* E. Donald Elliott et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 330-33 (1985).

19. 42 U.S.C. §§ 4321-4347 (2000).

20. 42 U.S.C. §§ 7401-7661f (2000). It is worth noting that the first federal clean air legislation was enacted in 1955 (Pub. L. No. 88-206) and amended in 1963, 1965, 1966, and 1967. With a few exceptions, such as the creation of federal emission standards for new automobiles mandated in 1967, the pre-1970 statutes were largely non-regulatory in nature. Although the 1970 Act was itself, technically, a series of amendments to the prior statutes, it is commonly referred to as *the* Clean Air Act, as it provides the foundation for the contemporary regulatory structure.

21. 33 U.S.C. §§ 1252-1385 (2000). The Clean Water Act is formally known as the Federal Water Pollution Control Act.

22. 16 U.S.C. §§ 1531-1544 (2000).

23. 7 U.S.C. §§ 136-136y (2000).

24. 42 U.S.C. §§ 6901-6992k (2000).

25. 42 U.S.C. §§ 300f-300j (2000).

26. 15 U.S.C. §§ 2601-2671 (2000).

27. *See* 33 U.S.C. § 1362(6) (2000) (defining "pollutant" to include "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water").

28. *Id.* § 1311.

29. 16 U.S.C. § 1538 (2000) (prohibiting the "take" of an endangered species); *see also* *Babbitt v. Sweet Home Chapter of Cmty.*, 515 U.S. 687, 690, 708 (1995) (upholding the definition of "take" to include "significant habitat modification or degradation" that "actually kills or injures wildlife").

30. 42 U.S.C. § 7545(a) (2000).

31. BRUCE YANDLE ET AL., CNTR. FOR FREE MKT. ENVIRONMENTALISM, *REGULATING AIR QUALITY THROUGH LITIGATION: THE DIESEL ENGINE EPISODE* 26 (2002).

of vehicle engines,³² and even the contents of some consumer products, including paint³³ and hairspray.³⁴

While federal environmental laws grant expansive regulatory authority to federal agencies, most environmental statutes are implemented following a "cooperative federalism" model.³⁵ The federal government outlines the contours of a given regulatory program, typically through statutory mandates elaborated upon by regulatory measures.³⁶ States are then encouraged to implement the program in lieu of the federal government, in accordance with federal guidelines. Provided these standards are met, states are free to tailor the details of their individual programs to accommodate local conditions and concerns. In most cases the federal standards operate as a floor—albeit a highly prescriptive one—and states remain free to adopt more stringent measures.³⁷ State programs that meet federal standards are typically eligible for federal financial assistance.³⁸ States that fail to adopt adequate programs are not only denied the relevant federal funding, they can also be subject to various sanctions and federal preemption of their programs.³⁹ That is, if states refuse to regulate in accordance with federal guidelines, the federal government may regulate in their place.

32. 42 U.S.C. § 7521; *see also* YANDLE ET AL., *supra* note 31, at 34.

33. 42 U.S.C. § 7511b(e)(1)(B); *see also* Allied Local & Reg'l Mfrs. Caucus v. EPA, 215 F.3d 61, 66 (D.C. Cir. 2000) (upholding federal regulation of paint composition under the Clean Air Act).

34. 42 U.S.C. § 7511b(e)(1)(B); 40 CFR §§ 59.202–214 (2004).

35. *New York v. United States*, 505 U.S. 144, 167 (1992) ("[W]here Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation. . . . This arrangement . . . has been termed cooperative federalism." (internal citations and quotations omitted)). Statutes that employ the cooperative federalism model include the Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act, portions of the Safe Drinking Water Act, and the Surface Mining Control and Reclamation Act.

36. *See* John Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1184 (1995). *See generally* DENISE SCHEBERLE, *FEDERALISM AND ENVIRONMENTAL POLICY: TRUST AND THE POLITICS OF IMPLEMENTATION* (1997) (detailing federal-state relations in the implementation of environmental policy).

37. Adam Babich, *Our Federalism, Our Hazardous Waste, and Our Good Fortune*, 54 MD. L. REV. 1516, 1534 (1995) ("The essence of cooperative federalism is that states take primary responsibility for implementing federal standards, while retaining the freedom to apply their own, more stringent standards."). A notable exception is the case of product standards. As a general matter, federal product standards, such as vehicle emission standards, tend to preempt more stringent state standards. *See, e.g.*, 42 U.S.C. § 7543(a) (preemption of state automobile emission standards); *id.* § 7545(c)(4)(A) (preemption of state fuel standards).

38. *See, e.g.*, 33 U.S.C. § 1256 (2000) (authorizing financial support for state water pollution control programs that adopt desired pollution control policies); *see also* Percival, *supra* note 9, at 1173 (noting the use of federal funding to encourage land-use planning and solid waste management).

39. *See, e.g.*, 42 U.S.C. § 7509 (detailing sanctions for failure to attain the National Ambient Air Quality Standards under the Clean Air Act); *see also* Percival, *supra* note 9, at 1174

In this system, the states are "indispensable," though not "equal partners."⁴⁰ While characterized as a "cooperative" structure, the federal-state relationship in environmental policy is often adversarial and ridden with conflict.⁴¹ State officials "resent what they believe to be an overly prescriptive federal orientation toward state programs, especially in light of stable or decreasing grant awards," according to one recent study.⁴² The proliferation of additional requirements without corresponding increases in federal financial assistance raises state and local concerns about "unfunded federal mandates."⁴³ To some observers, the partnership of cooperative federalism is more akin to a feudal relationship between a federal lord and state "vassals."⁴⁴

There are three reasons for adopting the cooperative federalism model in the context of environmental protection.⁴⁵ First, the federal government does not have the resources or personnel to implement detailed regulatory

(noting that under most environmental laws, the federal government will adopt and enforce a federal regulatory program in the absence of a sufficient state program).

40. Dwyer, *supra* note 36, at 1190 ("Although the states are by no means equal partners in regulating the environment, they paradoxically remain indispensable partners.").

41. See Percival, *supra* note 9, at 1144 ("[F]ederal environmental standards have been a chronic source of friction for federal-state relations."). States are frequent litigants challenging the validity or implementation of federal environmental regulations. See, e.g., *West Virginia v. EPA*, 362 F.3d 861, 865–66 (D.C. Cir. 2004) (challenging federal regulations requiring nitrogen oxide emission reductions under state implementation plans); *Nebraska v. EPA*, 331 F.3d 995, 997 (D.C. Cir. 2003) (challenging federal drinking water standards for arsenic); *Michigan v. EPA*, 213 F.3d 663, 669 (D.C. Cir. 2000) (challenging federal regulations requiring nitrogen oxide emission reductions under state implementation plans); *Virginia v. EPA*, 116 F.3d 499, 500–01 (D.C. Cir. 1997) (challenging federal vehicle emission standards).

42. SCHEBERLE, *supra* note 36, at 186.

43. See, e.g., Edward A. Zelinsky, *Unfunded Mandates, Hidden Taxation, and the Tenth Amendment: On Public Choice, Public Interest, and Public Services*, 46 VAND. L. REV. 1355, 1356 (1993) ("Few contemporary issues concern state and local policymakers as intensely as unfunded mandates."). Such concerns led to the passage of the Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (1995), but this legislation is largely symbolic. See U.S. GAO, UNFUNDED MANDATES: REFORM ACT HAS HAD LITTLE EFFECT ON AGENCIES' RULEMAKING ACTIONS (1998); Rena I. Steinzor, *Unfunded Environmental Mandates and the "New (New) Federalism": Devolution, Regulation, or Reform?*, 81 MINN. L. REV. 97, 100 (1996) (noting that UMRA's substantive requirements can be bypassed by a simple majority vote in Congress).

44. Dwyer, *supra* note 36, at 1185 ("So much political power has been reallocated to the federal government that, at times, the states could be mistaken for vassals of the federal government."). Indeed, in 1995 Nebraska Governor E. Benjamin Nelson testified before the Senate Judiciary Committee that "[w]hen I was elected Governor in 1990 and prepared my first budget, I honestly wondered if I was actually elected governor or just branch manager of the State of Nebraska for the federal government." *Hearing Before the Senate Subcommittee on the Constitution, Federalism, and Property Rights, and the Senate Judiciary Comm.* (1995) (statement of Governor E. Benjamin Nelson, Governor, State of Nebraska).

45. For a more detailed discussion of these justifications and the nature of cooperative federalism in environmental policy, see Jonathan H. Adler, Comment, *The Green Aspects of Printz: The Revival of Federalism and Its Implications for Environmental Law*, 6 GEO. MASON. L. REV. 573, 578–80 (1998). See also Dwyer, *supra* note 36, at 1217; Percival, *supra* note 9, at 1174–75.

proscriptions in all fifty states.⁴⁶ The federal government may set environmental priorities through legislation and regulation, but much of the actual implementation is dependent upon state agencies and personnel.⁴⁷ Second, the geographic and economic diversity of the nation requires local knowledge and expertise that is often unavailable at the federal level.⁴⁸ Environmental problems, and their solutions, will vary from place to place, limiting the federal government's ability to adopt nationwide solutions to environmental concerns that are equally applicable to multiple parts of the country.⁴⁹ Third, enlisting state and local cooperation in the imposition of potentially costly or intrusive environmental controls can blunt local opposition to federal mandates.⁵⁰ This facilitates the adoption of federal environmental standards while simultaneously blurring the lines of political accountability.⁵¹ For these reasons, most major environmental

46. See Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1201 (1977).

47. See U.S. GAO, EPA'S AND STATES' EFFORTS TO FOCUS STATE ENFORCEMENT PROGRAMS ON RESULTS 16 (1998) (noting that states accounted for 85% of enforcement actions in 1996); David L. Markell, *The Role of Deterrence-Based Enforcement in a "Reinvented" State/Federal Relationship: The Divide Between Theory and Reality*, 24 HARV. ENVTL. L. REV. 1, 32 (2000) (indicating that states are responsible for up to 90% of all facility inspections and environmental enforcement actions).

48. See Dwyer, *supra* note 36, at 1218 (noting that "[t]he knowledge necessary to administer any air pollution control program . . . can be found only at the local level"); see also HENRY N. BUTLER & JONATHAN R. MACEY, USING FEDERALISM TO IMPROVE ENVIRONMENTAL POLICY 27 (1996) ("Federal regulators never have been and never will be able to acquire and assimilate the enormous amount of information necessary to make optimal regulatory judgments that reflect the technical requirements of particular locations and pollution sources."); Alistair Ulph, *Harmonization and Optimal Environmental Policy in a Federal System with Asymmetric Information*, 37 J. ENVTL. ECON. & MGMT. 224, 225-26 (2000) (arguing that regional differences in environmental concerns undermine the case for federal harmonization of environmental standards where states have informational advantages over the federal government). This observation is based on the insights of Nobel Laureate economist F.A. Hayek, who observed "the knowledge of the circumstances of which we must make use never exists in concentrated or integrated form but solely as the dispersed bits of incomplete and frequently contradictory knowledge which all the separate individuals possess." F. A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 519-20 (1945). For more information on the "knowledge problem" in environmental policy, see Jonathan H. Adler, *Letting Fifty Flowers Bloom: Using Federalism to Spur Environmental Innovation*, in THE JURISDYNAMICS OF ENVIRONMENTAL PROTECTION: CHANGE AND THE PRAGMATIC VOICE IN ENVIRONMENTAL LAW 265-66 (Jim Chen ed., 2004).

49. Stewart, *supra* note 46, at 1266 (noting the "sobering fact" that "environmental quality involves too many intricate, geographically variegated physical and institutional interrelations to be dictated from Washington").

50. Stewart, *supra* note 46.

51. See David Schoenbrod, *Why States, Not EPA, Should Set Pollution Standards*, in ENVIRONMENTAL FEDERALISM 259, 264 (Terry Anderson & Peter J. Hill eds., 1997) ("[F]ederal mandates give federal legislators and the president the means to take credit for the benefits of environmental programs while placing the blame for any ensuing costs on state and local officials."). It is possible that this attenuation of political accountability is one reason

statutes adopt some measure of “cooperative federalism,” albeit to differing extents.⁵²

Federal environmental regulation arguably represents the most expansive assertion of federal authority. Even where federal environmental programs are cooperative in nature, environmental regulation calls upon the federal government to affect, influence, and regulate a wider range of behavior—economic and otherwise—than any other area of federal concern. Only federal environmental regulation, for example, could purport to regulate local activities ranging from home construction to recreational behavior on private land.⁵³

Despite the ambitious sweep of federal environmental legislation, there was little, if any, thought given to the constitutional justification for such enactments.⁵⁴ Congress adopted environmental statutes governing a wide range of activities and phenomena never-before subject to federal regulation without questioning whether any such legislation might exceed the scope of Congress’s enumerated powers.⁵⁵ Nearly all the major environmental statutes give a passing nod to the historic state role in addressing pollution concerns, yet then proceed to expand the federal government’s reach into

cooperative federalism is popular. See Michael S. Greve, *Against Cooperative Federalism*, 70 MISS. L.J. 557, 559 (2000).

52. See, e.g., *Bragg v. W. Va. Coal Ass’n*, 248 F.3d 275, 294 (4th Cir. 2001) (“The statutory federalism of SMCRA is quite unlike the cooperative regime under the Clean Water Act . . .”).

53. See, e.g., 58 Fed. Reg. 45,008, 45,020 (Aug. 25, 1993) (giving the U.S. Army Corps of Engineers authority to regulate “walking, bicycling or driving a vehicle through a wetland” because such activities could result in the “discharge of dredged material”).

54. See Denis Binder, *The Spending Clause as a Positive Source of Environmental Protection: A Primer*, 4 CHAP. L. REV. 147, 147 (2001) (“As the number of statutes approach the century mark, little thought has been given by Congress to the constitutional basis of the legislation.”); *id.* at 148 (“[W]hen the statutes were adopted, the underlying assumption was that the Commerce Clause grants virtually carte blanche authority to legislate for environmental protection.”); Philip Soper, *The Constitutional Framework of Environmental Law*, in *FEDERAL ENVIRONMENTAL LAW* 20, 24 (Erica L. Dolgin & Thomas G. P. Guilbert eds., 1974) (observing that applying contemporary Commerce Clause jurisprudence “to the environmental context results in a picture of congressional power that appears practically unbounded at least as far as concerns control over the typical areas of pollution”). But see *id.* at 21–22 (citing commentators who argued, in the 1960s, that some environmental concerns may lie beyond the scope of federal power).

55. Insofar as policy makers gave any consideration to constitutional limits on federal environmental legislation, they were concerned that some regulations controlling land use could result in compensable takings under the Fifth Amendment. See, e.g., FRED BOSSELMAN ET AL., *THE TAKING ISSUE* (1973) (detailing the potential constitutional limits on environmental regulation posed by the “takings clause” of the Fifth Amendment). Congress considered, and rejected, explicit federal controls on land use in 1973. See generally, Robert H. Nelson, *Federal Zoning: The New Era in Environmental Policy*, in *LAND RIGHTS: THE 1990S PROPERTY RIGHTS REBELLION* 295 (Bruce Yandle ed., 1995). Despite the defeat of this proposal, the cumulative impact of federal environmental statutes has been the imposition of substantial federal controls on private land use. *Id.* at 297 (“The full land-use consequences of the environmental legislation of the early 1970s, as subsequently amended, are only now coming to be more widely realized.”).

such terrain.⁵⁶ Because federal environmental programs are so expansive, environmental regulation may be particularly vulnerable to federalism constraints on federal power. Insofar as courts restrict the scope of federal regulatory authority due to federalism concerns, this may have a particular effect on environmental regulation.

II. THE SUPREME COURT'S FEDERALISM

Central to the Supreme Court's revived federalism jurisprudence is the idea that the structure of the Constitution creates a system of "dual sovereignty" in which both the federal government and the states are sovereigns.⁵⁷ Although often characterized as a "States rights" philosophy, "dual sovereignty" is supposed to operate for the benefit of citizens, not states.⁵⁸ Much as the horizontal separation of powers prevents any single branch of government from accumulating too much power, the division of authority between the federal and state governments protects liberty from government encroachment.⁵⁹ "The different governments will control each other, at the same time that each will be controlled by itself," explained James Madison in *Federalist No. 51*.⁶⁰ If the limits of federal power are respected, and the appropriate balance between the federal and state governments is maintained, interjurisdictional competition restrains state governments from imposing unnecessary burdens upon their citizens.⁶¹ The beneficiaries of this arrangement are not the state governments, as such, as

56. See, e.g., Endangered Species Act of 1973, 16 U.S.C. § 1531(c)(2) (2000) ("It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species."); Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1251(b) (2000) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States . . ."); Clean Air Act, 42 U.S.C. § 7402(a) (2000) ("The Administrator shall encourage cooperative activities by the States and local governments . . . and encourage the making of agreements and compacts between States for the prevention and control of air pollution.").

57. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

58. *New York v. United States*, 505 U.S. 144, 181 (1992) ("The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals."); see also John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, NW. U. L. REV. (forthcoming) (arguing that federalism allocates power between the state and federal governments for the benefit of the people of the nation and for the benefit of states *qua* states).

59. As the Court explained in *Gregory*: "Just as the separation and independence of the coordinate branches of Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." 501 U.S. at 458.

60. THE FEDERALIST No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961).

61. See generally MICHAEL GREVE, REAL FEDERALISM: WHY IT MATTERS, HOW IT CAN HAPPEN (1999).

they are forced to compete with one another for the loyalty of their citizens, but the people. Maintaining this balance is the purpose of federalism.

The Supreme Court's recent federalism jurisprudence has two distinct strains. The first focuses on the federal government's enumerated powers. These cases ask whether a given federal statute represents a proper exercise of one of Congress's enumerated powers. In these cases, the Court has held that the enumeration of distinct federal powers places affirmative limits on Congress's power. Some matters—those not within the bounds of the enumerated powers—are simply beyond the reach of federal hands. The second centers on protecting state sovereignty. The focus in these cases is the extent to which residual state sovereignty immunizes states from federal efforts to direct or otherwise influence state resources and policy decisions. Together, these two jurisprudential strains limit both *what* Congress may do and *how* Congress may do it.

A. ENUMERATED POWERS

From its inception the federal government has been a government of enumerated powers. As the Court declared in *Marbury v. Madison*, "The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written."⁶² Those powers not delegated to the federal government are, in the words of the Tenth Amendment, "reserved to the States, respectively, or to the people."⁶³ The bulk of Congress's powers are enumerated in Article I, section 8 of the Constitution, though others are scattered through the document, including the enforcement power contained in section 5 of the Fourteenth Amendment.⁶⁴ To the Court's current majority, it is a matter of "first principles" that congressional authority is limited to these powers.⁶⁵ *United States v. Lopez*⁶⁶ and *City of Boerne v. Flores*⁶⁷ make clear that even Congress's broadest powers—to regulate commerce and protect civil liberties under the Fourteenth Amendment—have distinct and defined limits beyond which Congress's reach may not extend. Several of the Supreme Court's recent

62. 5 U.S. (1 Cranch) 137, 176 (1803).

63. U.S. CONST. amend. X.

64. See, e.g., U.S. CONST. art. IV, § 1 (granting Congress the power to determine the effect of the Full Faith and Credit Clause); *id.* § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . ."); U.S. CONST. amend. XIII, § 2 (granting Congress the power to enforce the Thirteenth Amendment); U.S. CONST. amend. XV, § 2 (granting Congress the power to enforce the Fifteenth Amendment); U.S. CONST. amend. XVI (granting Congress the power to levy an income tax).

65. *United States v. Lopez*, 514 U.S. 549, 552 (1995).

66. 514 U.S. 549 (1995).

67. 521 U.S. 507 (1997).

federalism cases have sought to define the outer limits of federal enumerated powers in these two areas.⁶⁸

1. Commerce Clause

Article I, section 8 of the Constitution grants Congress numerous powers, including the power “[t]o regulate Commerce . . . among the several States.”⁶⁹ As explained by Chief Justice John Marshall, this clause—the Commerce Clause⁷⁰—grants Congress “the power to regulate; that is, to prescribe the rule by which commerce is to be governed.”⁷¹ This, by its own terms, is a rather expansive power. It, “like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.”⁷² Yet as broad as the commerce power may be, it is not without limits.⁷³ In Marshall’s words, there remains an “immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government.”⁷⁴

For most of the latter half of the twentieth century, the notion that there were justiciable limits on the scope of Congress’s Commerce Clause power was a dead letter.⁷⁵ In the name of regulating commerce, Congress

68. Explicit in the Court’s enumerated powers decisions is the holding that constitutional limitations on federal enumerated powers are judicially cognizable and represent appropriate subjects of judicial review. This has not always been universal. *See, e.g.,* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985) (holding that “political safeguards” for state interests are sufficient and obviate the need for judicial enforcement of federalism); *see also* Jesse H. Choper, *The Scope of National Power Vis-à-vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1557–60 (1977); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558–59 (1954); *cf.* John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1321–57 (1997) (documenting the Court’s subsequent rejection of the “political safeguards” approach to federalism).

69. U.S. CONST. art. I, § 8.

70. Although this clause is commonly referred to as the “Commerce Clause,” perhaps it would be more appropriate to refer to it as the “Interstate Commerce Clause” as it vests Congress the power to regulate commerce “among the several states” and not commerce generally. *See* *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 194 (1824) (“Comprehensive as the word ‘among’ is, it may very properly be restricted to that commerce which concerns more States than one.”); *see also* *Lopez*, 514 U.S. at 587 n.2 (Thomas, J., concurring) (“Even to speak of ‘the Commerce Clause’ perhaps obscures the actual scope of that Clause.”).

71. *Gibbons*, 22 U.S. (9 Wheat) at 196.

72. *Id.*

73. As stressed in *Marbury v. Madison*, the whole purpose of explicitly enumerating legislative powers was to provide limits on their scope. 5 U.S. (1 Cranch) 137, 176 (1803) (“To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?”).

74. *Gibbons*, 22 U.S. (9 Wheat) at 203.

75. *See, e.g.,* BRUCE ACKERMAN, *WE THE PEOPLE—VOL. 1: FOUNDATIONS* 105 (1991) (noting that after the New Deal “[a] commitment to federalism . . . was no longer thought to require a constitutional strategy that restrained the national government to a limited number of

could regulate just about anything.⁷⁶ As then-Justice William Rehnquist observed in 1981, "[O]ne could easily get the sense from this Court's opinions that the federal system exists only at the sufferance of Congress."⁷⁷ Although the Supreme Court had repeatedly reaffirmed the limited scope of the Commerce Clause power in its opinions, for decades it only honored these limitations in the breach.⁷⁸ Beginning in 1937, with the Court's decision in *NLRB v. Jones & Laughlin Steel Corp.* to uphold the regulation of intrastate activities that have a "substantial relation to interstate commerce,"⁷⁹ the Court would not look favorably upon another Commerce Clause challenge to federal legislation for almost sixty years.

In 1995, the Supreme Court reversed the conviction of Alfonso Lopez, Jr. for carrying a concealed handgun to school in violation of the federal Gun-Free School Zones Act of 1990 ("GFSZA"). In *United States v. Lopez*,⁸⁰ the Court held that a federal statute prohibiting the knowing possession of a gun within one thousand feet of a school exceeded the scope of the commerce power. Stressing that "the Constitution creates a Federal Government of enumerated powers,"⁸¹ the *Lopez* majority rejected the argument that Congress could regulate intrastate activities with only a tenuous connection to interstate commerce. Five years later, the Supreme Court reaffirmed this holding in *United States v. Morrison*,⁸² striking down provisions of the Violence Against Women Act ("VAWA") that, like the GFSZA, had only a hypothesized relationship to interstate commerce.

Under *Lopez*, the Constitution grants Congress the power to regulate in three areas: (1) "the use of the channels of interstate commerce;" (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce;" and (3) "those activities that substantially affect interstate commerce."⁸³ The first two categories are rather unambiguous. If an item is used or sold in interstate commerce, it may be regulated, as may the channels through which such items flow. Thus, for example, Congress may

enumerated powers over economic and social life"). This presumption is common within the environmental law literature. See, e.g., Holly Doremus, *Patching the Ark: Improving Legal Protection of Biological Diversity*, 18 *ECOLOGICAL L.Q.* 265, 293 (1991) ("As currently interpreted, the Commerce Power has a virtually unlimited sweep.").

76. As one federal judge observed, federal courts treated the commerce clause as the "Hey, you-can-do-whatever-you-feel-like Clause." Alex Kozinski, *Introduction to Volume Nineteen*, 19 *HARV. J.L. & PUB. POL'Y* 1, 5 (1995).

77. *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 308 (1981) (Rehnquist, J., concurring).

78. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937) ("That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system.").

79. *Id.* at 37.

80. 514 U.S. 549 (1995).

81. *Id.* at 552.

82. 529 U.S. 598 (2000).

83. *Lopez*, 514 U.S. at 558-59.

regulate or prohibit the sale of driver's license information and other personal data collected by public and private entities because such information is a product sold in interstate commerce.⁸⁴ The contours of the "substantial effects" test, on the other hand, are less obvious.

As described and applied in *Lopez* and *Morrison*, the "substantial effects" test is more qualitative than quantitative. It is more concerned with the nature of the regulated activity or the regulatory scheme in question than with the aggregate economic impact of the regulated activity alone, or in combination with other similarly regulated activities. The key question is whether the activity subject to federal regulation is itself related to "commerce" or any sort of economic enterprise" or whether the regulation is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."⁸⁵ Thus, Congress may regulate activities that are "economic in nature,"⁸⁶ such as industrial mining⁸⁷ or loan-sharking.⁸⁸ At the same time, Congress may reach relatively minor intrastate activities through broad economic regulatory schemes, such as a price maintenance regime for agricultural products.⁸⁹ That a given activity—whether domestic violence, the possession of a gun near a school, or insomnia⁹⁰—might have a substantial economic impact, even when aggregated with all other instances of like conduct, is insufficient. The Court explicitly rejected "the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."⁹¹

In *Morrison*, the Court identified four factors to consider when evaluating whether a given activity "substantially affects" interstate commerce. The first, and perhaps most important factor, is the economic or commercial nature of the activity in question. While the *Morrison* Court

84. See *Reno v. Condon*, 528 U.S. 118 (2000) (upholding the Driver's Privacy Protection Act as a proper exercise of Congress's Commerce Clause power).

85. *Lopez*, 514 U.S. at 561.

86. *Morrison*, 529 U.S. at 613.

87. See generally *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) (holding the Surface Mining and Reformation Act constitutional under the Commerce Clause).

88. See generally *Perez v. United States*, 402 U.S. 146 (1971) (holding that the loan sharking portion of the Consumer Credit Protection Act is constitutional under the Commerce Clause).

89. See generally *Wickard v. Filburn*, 317 U.S. 111 (1942) (upholding the application of agricultural production quotas to production for a farmer's own use because allowing such production would undermine the national price control scheme created by the Agricultural Adjustment Act of 1938); *Lopez*, 514 U.S. at 556 ("Even if appellee's activity be local and . . . not be regarded as commerce, it may still . . . be reached by Congress if it exerts a substantial economic effect on interstate commerce, . . . irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" (citing *Wickard*, 317 U.S. at 125)).

90. See *Brzonkala v. Va. Polytechnic Inst.*, 169 F.3d 820, 839 (4th Cir. 1999) (en banc) (citing estimates that insomnia has an estimated \$92.5 to \$107.5 billion annual impact on the U.S. economy), *aff'd sub nom*, *United States v. Morrison*, 529 U.S. 598 (2000).

91. *Morrison*, 529 U.S. at 617.

eschewed adopting a “categorical rule against aggregating the effects of any noneconomic intrastate activity,” it noted “thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where the activity is economic in nature.”⁹² It is important to note that the Court is using “economic” and “noneconomic” in a generalized, colloquial sense.⁹³ “Economic” activities are those that involve the production, distribution, or exchange of goods and services, as well as those activities undertaken for the purpose of such activities. That economists might describe an activity as “economic,” insofar as these activities (like all human conduct) can be described in economic terms, does not make it “economic” for purposes of Commerce Clause analysis under *Lopez* and *Morrison*.⁹⁴

The second factor is whether Congress included a jurisdictional element in the challenged statute that can serve to “limit its reach to a discrete set” of activities that substantially affect commerce.⁹⁵ For instance, in *Jones v. United States*,⁹⁶ a unanimous court interpreted the federal arson statute to cover “only property currently used in commerce or in an activity affecting commerce” so as to avoid a potential Commerce Clause issue. By its terms, the statute only reached those activities within Congress’s Commerce Clause authority. Such a jurisdictional element does not ensure a statute’s constitutionality,⁹⁷ but it can provide courts with a basis upon which to construe a statute so as to keep it within constitutional limits. Specifically, where a statute appears to stretch the outer bounds of Congress’s Commerce Clause authority, courts can construe the jurisdictional element narrowly so as to avoid the constitutional concern.⁹⁸

The third factor is whether Congress adopted legislative findings regarding the regulated activity’s alleged substantial effect on interstate commerce.⁹⁹ As with a jurisdictional element, the adoption of legislative

92. *Id.* at 613; see also Jim Chen, *The Story of Wickard v. Filburn: Agriculture, Aggregation, and Congressional Power over Commerce*, in CONSTITUTIONAL LAW STORIES 69, 104 (Michael C. Dorf ed., 2004) (“The aggregation principle remains nominally good law, but it operates only when the actors or activities at issue are commercial.”).

93. See Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 694–95 (1995); see also Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 ENVTL. L. 1, 12–14 (1999).

94. But see Allan Ides, *Economic Activity as a Proxy for Federalism: Intuition and Reason in United States v. Morrison*, 18 CONST. COMMENT. 563, 570–73 (2001) (arguing the economic, non-economic distinction is analytically incoherent).

95. *United States v. Lopez*, 514 U.S. 549, 562 (1995).

96. 529 U.S. 848 (2000).

97. See *Morrison*, 529 U.S. at 612 (noting the jurisdictional element “may” establish the constitutionality of a given statute under the Commerce Clause).

98. *Jones*, 529 U.S. at 857 (stating that “where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided” a court’s “duty is to adopt the latter”).

99. *Morrison*, 529 U.S. at 612.

findings does not ensure a statute's constitutionality.¹⁰⁰ Congress adopted legislative findings concerning the alleged effects of gender-motivated violence on interstate commerce, but the Supreme Court struck down the challenged VAWA provisions in *Morrison* nonetheless.¹⁰¹ But the adoption of such findings can assist a court in identifying a given activity's effect on interstate commerce, particularly if the effect is nonobvious.¹⁰² Findings alone will not protect a statute from Commerce Clause scrutiny, however. *Morrison* makes clear that the Court will independently evaluate congressional findings that purport to demonstrate that an otherwise non-commercial, intrastate activity substantially affects interstate commerce.

The fourth and final factor is the nexus between the regulated activity and the alleged substantial effect on interstate commerce. Where the relationship between the activity and the effect is "tenuous," a statute will not be upheld.¹⁰³ That the presence of guns in schools could disrupt the education process, thereby reducing the educational system's ability to produce a more educated, and presumably more productive, workforce and that this could well have a substantial impact on the economic well-being of the country, does not establish the sort of connection necessary to uphold a statute under the Commerce Clause. This sort of attenuated effect on commerce was hypothesized—and explicitly rejected—in *Lopez*.¹⁰⁴ To accept highly attenuated connections of this type between intrastate activities and interstate commerce as the basis for Commerce Clause jurisdiction would make the courts "hard pressed to posit any activity by an individual that Congress is without power to regulate."¹⁰⁵

To date, the consideration of these factors has not led to the invalidation of many federal statutes, environmental or otherwise.¹⁰⁶ Indeed, federal appellate courts have been extremely reluctant to strike down any federal statute on Commerce Clause grounds.¹⁰⁷ Concerns about the scope

100. *Lopez*, 514 U.S. at 557 n.2 ("[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 311 (1981))).

101. *Morrison*, 529 U.S. at 614–15.

102. See *Lopez*, 514 U.S. at 563.

103. *Id.* at 563–64.

104. *Id.* at 565; cf. *id.* at 618–20 (Breyer, J., dissenting) (arguing that "as long as one views the commerce connection, not as a 'technical legal conception,' but as 'a practical one,'" Congress had a "rational basis for finding a significant (or substantial) connection between gun-related school violence and interstate commerce," due to the "widespread" and "extremely serious" problem of guns in schools and the effect of education on interstate commerce).

105. *Id.* at 564; see also Michell N. Berman, Guillen and Gullibility: Piercing the Surface of Commerce Clause Doctrine, 89 IOWA L. REV. 1487, 1528 (2004) ("If the Rehnquist Court's developing Commerce Clause doctrine is driven by a single impulse, it is the insistence that the doctrine not amount to a blank check.").

106. The relevant environmental cases are discussed *infra* Part III.A.1.

107. See Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253, 1256 (2003);

of Commerce Clause authority have prompted some courts to narrow the scope of federal statutes containing jurisdictional elements.¹⁰⁸ In addition, the U.S. Court of Appeals for the Ninth Circuit has looked favorably on "as applied" challenges, whereby federal statutes are upheld, but nonetheless declared unconstitutional as applied to a given plaintiff due to the noneconomic, intrastate character of the conduct at issue.¹⁰⁹ Yet while application of *Lopez* and *Morrison* has divided several circuits, thus far federal statutes have remained largely immune from Commerce Clause challenges.¹¹⁰

2. Section 5 of the Fourteenth Amendment

While the Commerce Clause cases are the most important enumerated powers cases for the future of environmental protection, a second line of cases merits a brief discussion. These cases address the reach of federal power under section 5 of the Fourteenth Amendment. As generally recognized, the primary purpose of the Fourteenth Amendment was to provide freed slaves and other African-Americans greater federal protection from arbitrary exercises of state power.¹¹¹ Among other things, the Amendment prohibits states from abridging the "privileges or immunities" of U.S. citizens, depriving any person of "life, liberty, or property without due process of law," and denying "equal protection of the laws" to any

Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of Lopez, or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369, 392-93 (2000).

108. See, e.g., *United States v. Lamont*, 330 F.3d 1249, 1254-55 (9th Cir. 2003) (finding that the defendant's action did not fall within the jurisdictional limits of the federal arson statute); *United States v. Perrotta*, 313 F.3d 33, 36 (2d Cir. 2002) (same, but under Hobbs Act); *United States v. Ballinger*, 312 F.3d 1264, 1276 (11th Cir. 2002) (same, but under Church Arson Prevention Act); *United States v. Rea*, 300 F.3d 952, 961-62 (8th Cir. 2002) (same, but under federal arson statute); *United States v. Carr*, 271 F.3d 172, 179-80 (4th Cir. 2001) (same); *United States v. Johnson*, 246 F.3d 749, 752 (5th Cir. 2001) (same).

109. See *Raich v. Ashcroft*, 352 F.3d 1222, 1222 (9th Cir. 2003) (upholding an as-applied commerce clause challenge to the application of the federal Controlled Substances Act to medical marijuana); *United States v. Stuart*, 348 F.3d 1132, 1142 (9th Cir. 2003) (upholding a commerce clause challenge to federal prohibition of possession of fully-automatic weapons as applied to a home-made firearm); *United States v. McCoy*, 323 F.3d 1114, 1140-41 (9th Cir. 2003) (upholding a commerce clause challenge to federal prohibition on possession of child pornography as applied to a family photo).

110. See *GDF Realty v. Norton*, 362 F.3d 286, 289 (5th Cir. 2004) (denial of an en banc petition); *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1158 (D.C. Cir. 2003) (denial of an en banc petition); *United States v. McFarland*, 311 F.3d 376, 424 (5th Cir. 2002) (en banc) (upholding a Hobbs Act conviction); *United States v. Fasse*, 265 F.3d 475, 479 (6th Cir. 2001) (en banc) (upholding the Child Support Recovery Act of 1992 on Commerce Clause grounds); *United States v. Hickman*, 179 F.3d 230, 231 (5th Cir. 1999) (en banc) (upholding a Hobbs Act conviction).

111. See RONALD D. ROTUNDA & JOHN E. NOWAK, 2 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE § 15.2 (2d ed. 1999).

person within the state.¹¹² Section 5 of the amendment grants Congress the "power to enforce" these prohibitions and the remainder of the Fourteenth Amendment's guarantees "by appropriate legislation."¹¹³

Section 5 is an affirmative grant of legislative power to Congress.¹¹⁴ Yet like the powers enumerated in Article I, section 8, this power is subject to judicially enforceable limits. Specifically, the Court held in *City of Boerne v. Flores* that Congress's section 5 power "extends only to 'enforcing' the provisions of the Fourteenth Amendment."¹¹⁵ The power is "remedial" in nature¹¹⁶ and may only be exercised to control state action.¹¹⁷ While section 5 grants Congress the power to proscribe "conduct which is not itself unconstitutional" so as to deter or remedy violations of the Fourteenth Amendment's substantive guarantees, Congress does not have the "power to decree the substance of the Fourteenth Amendment's restrictions on the states."¹¹⁸ Thus, in *City of Boerne* the Court struck down Congress's effort to force state and local governments to provide greater accommodations for religious practice than are required by the Free Exercise Clause of the First Amendment.¹¹⁹

Where Congress enacts legislation that extends beyond the prohibition of actual constitutional violations, the Court requires "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."¹²⁰ In practice, this means that Congress may adopt prophylactic legislation to guard against potential constitutional violations.¹²¹ The nature and scope of the proscribed conduct must be related to the violation Congress wants to prevent. Under the current understanding of section 5, Congress's ability to identify and address state violations of Fourteenth Amendment rights independent of judicial findings of such violations is fairly limited.¹²²

112. U.S. CONST. amend. XIV, § 1.

113. *Id.*

114. *United States v. Morrison*, 529 U.S. 598, 619 (2000) ("Section 5 is 'a positive grant of legislative power.'" (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966))).

115. 521 U.S. 507, 519 (1997) (quoting U.S. CONST. amend XIV, § 5).

116. *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966).

117. *Morrison*, 529 U.S. at 621 ("[T]he Fourteenth Amendment, by its very terms, prohibits only state action.").

118. *City of Boerne*, 521 U.S. at 519 (striking down the Religious Freedom Restoration Act for exceeding Congress's power under section 5 of the Fourteenth Amendment); *see also id.* ("Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation." (quoting U.S. CONST. amend. XIV, § 5)).

119. *Id.* at 536 (striking down the Religious Freedom Restoration Act for exceeding Congress's power under section 5 of the Fourteenth Amendment).

120. *Id.* at 520; *see also* *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000).

121. *Nev. Dept. of Human Res. v. Hibbs*, 538 U.S. 721, 728 (2003).

122. *See generally*, Evan H. Caminker, "Appropriate" Means-Ends Constraints on Section 5 Powers, 53 STAN. L. REV. 1127 (2001) (discussing the Court's narrowing of Congress's ability to regulate

B. STATE SOVEREIGNTY

The enumeration of Congress's delegated powers is not the only limit on the scope of federal power. There are constitutional limits on the exercise of federal power, both explicit (as in the Bill of Rights) and implicit (as in those found in the Constitution's history and structure). The Supreme Court has found within the Constitution significant structural limits on the exercise of federal power that arise from the residual "sovereign" status of state governments. Building on the concept of "dual sovereignty," the Court has invalidated federal actions that impede upon, or affront the "dignity" of, states *qua* states.¹²³ In particular, the Court has held that the federal government may neither command states to participate in or implement a federal regulatory program,¹²⁴ nor may the federal government abrogate state sovereign immunity from suits for money damages save in limited circumstances.¹²⁵ These doctrines are not derived from the Constitution's text, but rather from structural considerations and unspoken assumptions in the document. They are nonetheless key components of the contemporary Court's federalism jurisprudence.

1. Commandeering

The first structural limitation is the "anti-commandeering" principle. Specifically, "the Federal Government may not compel the states to implement, by legislation or executive action, federal regulatory programs."¹²⁶ In 1992, New York State challenged portions of the Low-Level Radioactive Waste Policy Amendments Act of 1985,¹²⁷ which threatened to require states with inadequate waste disposal capacity to take title to, and assume liability for, low-level radioactive waste generated within the state. In striking down the measure in *New York v. United States*,¹²⁸ the Court held that

state conduct under section 5, and arguing that the Court's congruence and proportionality test is the wrong test); Samuel Estreicher & Margaret H. Lemos, *The Section 5 Mystique, Morrison, and the Future of Federal Antidiscrimination Law*, 2000 SUP. CT. REV. 109 (2000) (same); Marci Hamilton & David Schoenbrod, *The Reaffirmation of Proportionality Analysis under Section 5 of the Fourteenth Amendment*, 21 CARDOZO L. REV. 469 (1999) (discussing the Court's narrowing of Congress's ability to regulate state conduct under section 5, but arguing that the Court's congruence and proportionality test is the correct test).

123. *Alden v. Maine*, 527 U.S. 706, 749 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44, 58 (1996) (noting sovereign immunity serves, in part, "to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties'" (quoting *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993))).

124. *Printz v. United States*, 521 U.S. 898, 935 (1997) ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.").

125. See, e.g., *Alden*, 527 U.S. at 706.

126. *Printz*, 521 U.S. at 925.

127. Pub. L. No. 99-240, 99 Stat. 1842.

128. 505 U.S. 144 (1992).

"while Congress has substantial power under the Constitution to encourage States to provide for the disposal of the radioactive waste generated within their borders, the Constitution does not confer upon Congress the ability simply to *compel* the States to do so."¹²⁹ Writing for the majority in *New York*, Justice O'Connor explained, "[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress's instructions."¹³⁰ To hold otherwise, the Court explained, would be to reject the idea that the states themselves retain substantial sovereignty within the federal system. It would also undermine accountability within the federal system.¹³¹

The Court's holding laid out simple ground rules for federal efforts to enlist State assistance in regulatory programs: "The Constitution enables the Federal Government to pre-empt state regulation contrary to federal interests, and it permits the Federal Government to hold out incentives to the States as a means of encouraging them to adopt suggested regulatory schemes. It does not, however, authorize Congress simply to direct the States" to adopt Congress's policy prescriptions.¹³² In simple terms: "Whatever the outer limits of [State] sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program."¹³³

This limitation applies equally to efforts to commandeer a state or local government executive as a state legislature.¹³⁴ Congress is no more able to direct the activities of local law enforcement than it is a state senate. To hold otherwise would enable Congress to sidestep *New York* by directly ordering state officials to implement federal measures, bypassing the state legislature in the process.¹³⁵ Such federal power to direct state executive officials would infringe upon state legislatures' ability to control state policy.¹³⁶ For this reason, the Supreme Court in *Printz v. United States* invalidated portions of a federal statute directing state law enforcement officials to perform background checks for handgun purchases. That the background-check requirement was arguably little more than a ministerial obligation, and did

129. *Id.* at 149 (emphasis added).

130. *Id.* at 162. Justice O'Connor found support for her opinion in the language of *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, concluding that Congress cannot "commandeer[] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." 452 U.S. 264, 288 (1981).

131. *New York*, 505 U.S. at 168–69 (stating that federal mandates on state governments diminish political accountability at both the state and local level).

132. *Id.* at 188.

133. *Id.*

134. *Printz v. United States*, 521 U.S. 898, 935 (1997).

135. *Id.* at 929–30.

136. The anti-commandeering principle does not, however, apply to state judiciaries due to the express language of the Supremacy Clause. See generally *Testa v. Katt*, 330 U.S. 386 (1947).

not impose a substantial burden on the local law enforcement officers, was deemed immaterial.¹³⁷

New York and *Printz* did not limit Congress's ability to regulate interstate commerce or other matters identified in Article I of the Constitution. These cases place no limitation on Congress's ability to regulate directly those matters within its control. Instead, the anti-commandeering rule proscribes the methods that Congress may use to effect such regulation. It is a structural barrier limiting the federal government's ability to reorient state priorities and resources. Of course, Congress is not always interested in authorizing direct regulation. Administering programs through state governments may obscure the source of regulatory edicts and blunt any political backlash over unpopular rules.¹³⁸ Much as unbounded delegations to regulatory agencies enable Congress to posture about achieving important public ends without accounting for the costs entailed by federal programs,¹³⁹ mandating state implementation of federal programs may serve Congress's institutional interests by obscuring federal responsibility for given regulatory requirements. Thus, in many cases Congress would prefer to regulate through the states.¹⁴⁰

Where Congress is unwilling to instruct the federal executive to regulate directly, it may seek to induce voluntary state participation in a federal scheme.¹⁴¹ The most obvious means of accomplishing this is to offer funds to the states with conditions attached, or to threaten to cut off an existing funding stream if specified conditions are not met.¹⁴² Such encouragement has significant force, but it also has constitutional limits. Indeed, the structural constraints on federal power imposed by *New York* and *Printz* imply such limits on the use of federal funds. As discussed below, Congress's spending power can no more authorize infringements upon state governments than can the power to regulate interstate commerce.¹⁴³ Both must be subject to federalism restraints. While *New York* and *Printz* did not impose substantive restraints upon Congress's power, they did place structural impediments to the enactment of laws that would excessively

137. *Printz*, 521 U.S. at 935 ("[N]o case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.").

138. In this fashion, commandeering can blur both the line of credit as well as that of blame.

139. See generally DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993).

140. See Greve, *supra* note 51, at 614–15.

141. The Court noted that there are "a variety of methods, short of outright coercion, by which Congress may urge a State to adopt a legislative program consistent with federal interests." *New York v. United States*, 505 U.S. 144, 167 (1992).

142. *Id.* ("[U]nder Congress's spending power 'Congress may attach conditions on the receipt of federal funds.'" (quoting *South Dakota v. Dole*, 483 U.S. 203, 206 (1987))).

143. See *infra* Part IV.

intrude into the states' sovereign realms and thereby threaten individual liberty.

It is important to note that the contemporary anti-commandeering principle stands in contrast to the Court's prior effort to protect state sovereignty by preventing federal regulation in *National League of Cities v. Usery*.¹⁴⁴ In *National League of Cities* the Court held that generally applicable federal regulations did not apply to state governments insofar as they infringed upon state sovereignty or impeded "traditional governmental functions."¹⁴⁵ On this basis the Court held that the minimum wage and overtime provisions of the Fair Labor Standards Act ("FLSA") did not apply to state governments, though the law did apply to private employers.¹⁴⁶ *National League of Cities* was explicitly overruled in 1985 by *Garcia v. San Antonio Metropolitan Transit Authority*, which upheld the application of the FLSA to state government employers.¹⁴⁷ Under *Garcia*, states are subject to neutral regulatory measures adopted by Congress to regulate the actions of public and private parties alike.¹⁴⁸ Federal statutes that regulate state conduct are permissible so long as they do not regulate states as states, but rather only regulate states as private actors, such as employers or owners of databases.¹⁴⁹

2. Sovereign Immunity

Just as the federal government may not commandeer state governments, the federal government is generally precluded from abrogating state sovereign immunity. In 1996, in *Seminole Tribe of Florida v. Florida*,¹⁵⁰ the Supreme Court held that Congress may not subject a state to suit for money damages in federal court pursuant to an otherwise valid exercise of the Congress's enumerated powers in Article I, section 8. Three years later, in *Alden v. Maine*,¹⁵¹ the Court held that Congress was similarly barred from abrogating state sovereign immunity in state court. In 2002, in

144. 426 U.S. 833 (1976). For a brief discussion of the historical development of the Court's federalism jurisprudence in this area, see Adler, *supra* note 45, at 582-89.

145. *Nat'l League of Cities*, 426 U.S. at 841, 852.

146. *Id.*

147. 469 U.S. 528 (1985).

148. See also *Reno v. Condon*, 528 U.S. 141, 151 (2000) (upholding the application of the Driver's Privacy Protection Act to state governments as the owners of commercially valuable databases). Note, however, that subsequent cases reject the underlying doctrinal rationale of *Garcia*, namely that states are sufficiently influential in the legislative process to obviate any need for judicial resolution of federalism concerns. See Yoo, *supra* note 68.

149. See *Reno*, 528 U.S. at 151 ("[T]he DPPA does not require the States in their sovereign capacity to regulate their own citizens. The DPPA regulates the States as the owners of data bases.").

150. 517 U.S. 44 (1996).

151. 527 U.S. 706 (1999).

Federal Maritime Commission v. South Carolina State Ports Authority,¹⁵² the Court further held that states are likewise immune to federal administrative proceedings initiated by private parties.

The Court's sovereign immunity cases are typically characterized as "Eleventh Amendment" cases, as this amendment is the only potential textual basis for state sovereign immunity. Yet this is "something of a misnomer."¹⁵³ The text of the Amendment reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."¹⁵⁴ Enacted to overturn *Chisholm v. Georgia*,¹⁵⁵ the Amendment appears to prohibit only those suits against states initiated by citizens of *other* states, not citizens of the state to be sued.¹⁵⁶ Yet since *Hans v. Louisiana*,¹⁵⁷ in 1890, the Court has held that states are also immune from suits by their own citizens.

In *Alden* the Court made explicit what had been implicit in its prior sovereign immunity holdings: the source of state sovereign immunity is not constitutional text, but the Constitution's structure and the states' pre-existing status as sovereign entities. Drawing upon a heavily contested interpretation of original intent with regard to state immunity from suit,¹⁵⁸ as well as longstanding Court precedent,¹⁵⁹ the Court explained, "The Eleventh Amendment confirmed, rather than established, sovereign immunity as a constitutional principle."¹⁶⁰ State sovereign immunity is presumed to have

152. 535 U.S. 743 (2002). Other recent cases limiting Congress's ability to abrogate state sovereign immunity include *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999). Cf. *Tennessee v. Lane*, 124 S. Ct. 1978 (2004) (upholding abrogation of state sovereign immunity under Title II of the Americans with Disabilities Act); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (upholding abrogation of sovereign immunity under the Family and Medical Leave Act).

153. *Alden*, 527 U.S. at 712.

154. U.S. CONST. amend. XI.

155. 2 U.S. 419 (1793).

156. Note, however, that the actual language of the Amendment reads as a rule of construction—the judicial power is not to be "construed" in a particular manner—rather than a substantive limitation or guarantee.

157. 134 U.S. 1 (1890).

158. See 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 529–30 (3d. ed. 2000) (noting that most scholars believe that "the Eleventh Amendment operates only to restrict federal jurisdiction"); see also *id.* at 529 n.70 and sources cited therein. See generally MELVYN DURCHSLAG, *STATE SOVEREIGN IMMUNITY: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* (2002) (surveying history, scholarship, and application of the Eleventh Amendment).

159. See *Hans*, 134 U.S. at 12 (holding that *Chisholm v. Georgia* was contrary to the Constitutional Framers' intent).

160. *Alden v. Maine*, 527 U.S. 706, 728–29 (1999); see also *Fed. Mar. Comm'n v. S.C. State Ports*, 535 U.S. 743 754 (2002) ("[T]he sovereign immunity enjoyed by the States extends beyond the literal text of the Eleventh Amendment.").

preexisted the ratification of the Constitution, and individual states “entered the Union ‘with their sovereignty intact.’”¹⁶¹ This immunity lies “beyond the congressional power to abrogate by Article I legislation”¹⁶² and extends to both state and federal courts, as well as to administrative proceedings.¹⁶³

State sovereign immunity is not absolute. Under the Court’s sovereign immunity decisions, citizens retain substantial ability to ensure that states comply with applicable federal laws without violating state sovereign immunity. First, and perhaps most important, Congress may abrogate state sovereign immunity pursuant to a proper exercise of its powers under section 5 of the Fourteenth Amendment.¹⁶⁴ Enacted after the Eleventh Amendment, and well after the Founding period, the Fourteenth Amendment is presumed to authorize the abrogation of state sovereign immunity whereas the congressional powers enumerated in Article I, section 8 do not. Moreover, the Fourteenth Amendment was expressly adopted to vindicate individual rights as against state power, and therefore, may be presumed to impinge upon state sovereignty to a far greater degree than the provisions of Article I.¹⁶⁵ Where an abrogation of state sovereign immunity is predicated on a proper exercise of Congress’s power to “enforce” the provisions of the Fourteenth Amendment—itsself a matter the Court’s federalism jurisprudence addresses¹⁶⁶—Congress may subject states to such suits.

The Fourteenth Amendment is not the only check on state sovereign immunity. Notwithstanding the holdings of *Seminole Tribe* and *Alden*, individuals may sue state officials directly under the *Ex Parte Young*¹⁶⁷ doctrine to seek injunctive relief, such as a court order requiring that state officials comply with applicable federal laws. The federal government further retains the authority to take such actions as are necessary and appropriate to directly enforce federal law.¹⁶⁸ Sovereign immunity is no bar to such actions, though it does bar private suits to enforce federal law.¹⁶⁹ State sovereign immunity also does not extend to municipal and other local governments.¹⁷⁰ While states, like the federal government, retain sovereign

161. *Fed. Mar. Comm’n*, 535 U.S. at 752 (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991)).

162. *Alden*, 527 U.S. at 754.

163. *See Fed. Mar. Comm’n*, 535 U.S. at 743.

164. *See, e.g., Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 726 (2003).

165. *Id.* at 726–27.

166. *See infra* Part II.A.2.

167. 209 U.S. 123 (1908).

168. *Alden v. Maine*, 527 U.S. 706, 755–56 (1999).

169. *Id.* at 755 (“A suit which is commenced and prosecuted against a State in the name of the United States by those who are entrusted with the constitutional duty to ‘take Care that the Laws be faithfully executed,’ differs in kind from the suit of an individual . . .” (quoting U.S. CONST. art. II, § 3)).

170. *Id.* at 756; *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 313 (1990).

immunity, this immunity may be waived or otherwise relinquished voluntarily.¹⁷¹ Much as the federal government consents to suit in many instances, so too can states agree to give up their immunity from certain types of suits.¹⁷² Finally, it is important to recognize that good-faith compliance with federal law is the norm in most states most of the time.¹⁷³

In summary, under the Court's sovereignty-oriented holdings, the federal government may require *all* employers, public and private, to pay the federal minimum wage or otherwise comply with federal labor standards.¹⁷⁴ It can also create a private right of action so employees can sue private employers that do not comply.¹⁷⁵ Such measures would be proper and constitutional exercises of the federal power to regulate interstate commerce. The federal government may not create a private cause of action for public employees to sue states for minimum wage violations, however.¹⁷⁶ Except where the federal statute in question is enacted pursuant to section 5 of the Fourteenth Amendment to enforce the Constitution's guarantee of fundamental liberties or equal protection, such efforts to subject states to suits for money damages without their consent will be unavailing.

III. JUDICIAL FEDERALISM & FEDERAL ENVIRONMENTAL REGULATION

Some academic and political commentators fear the Supreme Court's more aggressive stance toward broad assertions of federal power could negatively affect environmental regulation.¹⁷⁷ A federal government of truly limited powers may be unable to achieve certain environmental goals, or unable to implement certain desired environmental policies. Limited by federalism principles, the federal government may be unable to ensure adequate levels of environmental protection.

These fears have a reasonable foundation. There is no doubt that the doctrinal logic underpinning some of the federalism decisions challenges the traditional environmental paradigm and threatens at least some existing environmental programs. Most of these statutes were adopted when there was little consideration of constitutional limits on federal power.¹⁷⁸ These laws are vulnerable to a more restrictive federalism jurisprudence. Despite the risks to federal environmental statutes, federal appellate courts have

171. *Alden*, 527 U.S. at 755.

172. *Id.* ("Many States, on their own initiative, have enacted statutes consenting to a wide variety of suits.").

173. See Steven R. McAllister & Robert L. Glicksman, *State Liability for Environmental Violations: The U.S. Supreme Court's "New" Federalism*, 29 ENVTL. L. REP. 10,665, 10,669 (1999).

174. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 555 (1985).

175. See, e.g., 29 U.S.C. § 216(b) (2000) (providing for a private cause of action for violations of the Fair Labor Standards Act).

176. *Alden*, 527 U.S. at 712.

177. See *supra* notes 5–8 and accompanying text; see also *infra* Part V.

178. See *supra* note 54 and accompanying text.

resisted most opportunities to impose federalism constraints on federal environmental regulation. While federal power has been clipped on the margin, federalism principles have not had a particularly significant impact on the scope of federal environmental regulation to date.

A. ENUMERATED POWERS

Enumerated powers claims represent the most direct challenge to federal environmental regulatory power. Such claims strike not at the specific regulatory means employed by the government to reach a particular end, but at the federal government's ability to regulate a given subject matter at all. As such, insofar as the doctrine of enumerated powers affirmatively limits federal environmental regulatory authority, it could threaten to limit significantly the federal government's ability to regulate environmental concerns directly.

1. Commerce Clause

The scope of federal power under the Commerce Clause is of particular importance because most federal environmental statutes are premised upon Congress's power to regulate "[c]ommerce . . . among the several States."¹⁷⁹ Indeed, when the various environmental statutes were adopted, the underlying assumption was that the Commerce Clause "grants virtually carte blanche authority to Congress to legislate for environmental protection."¹⁸⁰ Judicially imposed limits on the scope of the commerce power will constrain the federal government's ability to regulate environmental concerns directly. Although most activities subject to federal environmental regulations can be considered "commercial" or "economic," in some sense, it is not clear that all such activities fall within the scope of the commerce power. Academic commentators were immediately aware that *Lopez* and *Morrison*, if applied aggressively to environmental statutes, could shake the foundations of federal environmental law.¹⁸¹ Many environmental laws

179. U.S. CONST. art. I, § 8, cl. 3; see McAllister & Glicksman, *supra* note 173, at 10,665 ("[F]ederal environmental laws generally are premised on Congress's Article I power to regulate interstate commerce . . .").

180. Binder, *supra* note 54, at 148.

181. See Richard Lazarus, *Corps Slips on Lopez*, FWS Wins, ENVTL. F., Mar.-Apr. 1998, at 8 (noting that the Corps's wetlands regulations were "clearly" constitutional prior to *Lopez*, but unconstitutional afterwards); Lori J. Warner, *The Potential Impact of United States v. Lopez on Environmental Regulation*, 7 DUKE ENVTL. L. & POL'Y F. 321, 364-65 (1997); J. Blanding Holman IV, Note, *After United States v. Lopez: Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause Attack?* 15 VA. ENVTL. L.J. 139, 211 (1995); David A. Linehan, Note, *Endangered Regulation: Why the Commerce Clause May No Longer Be Suitable Habitat for Endangered Species and Wetlands Regulation*, 2 TEX. REV. L. & POL. 365, 426-27 (1998). But see Steven M. Johnson, *United States v. Lopez: A Missstep, But Hardly Epochal for Federal Environmental Regulation*, 5 N.Y.U. ENVTL. L.J. 33, 67-74 (1996) (arguing that federal wetlands regulation will survive the inevitable Commerce Clause challenges); Bradford C. Mank, *Protecting Intrastate Threatened Species: Does the Endangered Species Act Encroach on Traditional State Authority and Exceed*

regulate intrastate activities irrespective of their economic nature or impact on interstate commerce. Few environmental statutes contain jurisdictional elements or other provisions to keep their jurisdiction within constitutional limits.¹⁸²

Thus far, federal appellate courts have uniformly rejected Commerce Clause challenges to the scope of federal environmental regulation. Constitutional challenges to the application of the Clean Air Act;¹⁸³ Clean Water Act;¹⁸⁴ Endangered Species Act;¹⁸⁵ and Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")¹⁸⁶ to intrastate activities have all failed thus far. In many of these cases, federal regulatory authority was upheld because the statute or regulations in question regulated explicitly industrial or commercial activity.¹⁸⁷ In *United States v. Ho*,¹⁸⁸ for example, the U.S. Court of Appeals for the Fifth Circuit upheld provisions of the Clean Air Act establishing work practice standards for asbestos removal. Considering the four factors identified in *Lopez* and *Morrison*,¹⁸⁹ the court held that the rules in question satisfied the Commerce Clause requirement as "the regulated intrastate activity, asbestos removal, is very much a commercial activity in today's economy."¹⁹⁰ For the most part, the result in district courts has been the same, upholding federal environmental statutes and regulations in the face of Commerce Clause

the Outer Limits of the Commerce Clause?, 36 GA. L. REV. 723, 723-24 (2002) ("Because federal environmental statutes rely on the Commerce Clause as the basis for congressional authority, a broad reading of *Lopez* and *Morrison* might call into question the constitutionality of at least some environmental statutes or regulations.").

182. One prominent exception is that the Clean Water Act only applies to "navigable waters" of the United States. This provision enabled the Supreme Court to read the scope of federal authority under the CWA narrowly so as to avoid potential Commerce Clause concerns. *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 166-68 (2001); *see infra* Part III.A.1.b.

183. *See generally* *Allied Local & Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61 (D.C. Cir. 2000).

184. *See generally* *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003); *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 191 F.3d 845 (7th Cir. 1999). Appellate courts have, on the other hand, adopted narrowing constructions of federal environmental statutes so as to avoid potential Commerce Clause concerns. *See* *United States v. Wilson*, 133 F.3d 251, 254 (4th Cir. 1997) (finding federal wetland regulations to be "unauthorized by the Clean Water Act as limited by the Commerce Clause").

185. *See generally* *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997).

186. *See generally* *Freier v. Westinghouse Elec. Corp.*, 303 F.3d 176 (2d Cir. 2002); *United States v. Olin Corp.*, 107 F.3d 1506 (11th Cir. 1997).

187. *See* *Johnson*, *supra* note 181, at 65 ("[M]ost of the central provisions of the major federal environmental laws regulate industrial or commercial activity.").

188. 311 F.3d 589 (5th Cir. 2002).

189. *See supra* notes 92-105 and accompanying text.

190. *Ho*, 311 F.3d at 602.

challenges.¹⁹¹ This phenomenon is not isolated to environmental law. Federal courts, generally, have been reluctant to apply *Lopez* and *Morrison* so as to curtail the reach of federal Commerce Clause authority.¹⁹²

Despite this pattern, it seems likely that some environmental statutes exceed the scope of the Commerce Clause power delineated in *Lopez* and *Morrison*. Most vulnerable are the Endangered Species Act ("ESA")¹⁹³ and portions of the Clean Water Act ("CWA").¹⁹⁴ Neither the ESA nor the CWA explicitly regulate commercial activities, as such. Under the ESA, any and all activities that harm endangered species, including modest habitat modification, are potentially subject to federal regulation. Regulation under the CWA is confined to "navigable waters," which the federal government has defined to include all waters and wetlands irrespective of their navigability or relationship to interstate commerce.¹⁹⁵ In each case, the federal government may have asserted regulatory authority beyond that authorized by the Commerce Clause.

a. Endangered Species Act

Several circuit courts have considered Commerce Clause challenges to the ESA's prohibition on the "taking" of listed species on private land.¹⁹⁶ The Commerce Clause claim has been rejected each time, yet the rationales adopted by the courts have varied a great deal and are fundamentally mutually inconsistent—a point noted by dissenting judges in several circuits. There is substantial tension between the logic of *Lopez* and *Morrison*, on the one hand, and the appellate holdings in these cases on the other.

191. See generally *FD&P Enter., Inc. v. United States Army Corps of Eng'rs*, 239 F. Supp. 2d 509 (D.N.J. 2003) (upholding federal wetland regulations); *United States v. Domenic Lombardi Realty*, 204 F. Supp. 2d 318 (D.R.I. 2002) (upholding CERCLA); *United States v. Red Frame Parasail*, 160 F. Supp. 2d 1048 (D. Ariz. 2001) (upholding the Airborne Hunting Act); *United States v. Glidden Co.*, 3 F. Supp. 2d 823 (N.D. Ohio 1997) (upholding CERCLA); *United States v. NL Indus.*, 936 F. Supp. 545 (S.D. Ill. 1996) (upholding CERCLA); *Nova Chems., Inc. v. GAF Corp.*, 945 F. Supp. 1098 (E.D. Tenn. 1996) (upholding CERCLA). But see *United States v. Olin Corp.*, 927 F. Supp. 1502, 1532–33 (S.D. Ala. 1996) (invalidating CERCLA for *inter alia* exceeding the scope of Congress's Commerce Clause power), *rev'd*, 107 F.3d 1506 (11th Cir. 1997).

192. See *Reynolds & Denning*, *supra* note 107, at 385–89 (observing that federal courts have been reluctant to strike down federal statutes on Commerce Clause grounds across the board).

193. 16 U.S.C. §§ 1531–1544 (2000).

194. 33 U.S.C. §§ 1251–1387 (2000). The Clean Water Act is formally known as the Federal Water Pollution Control Act.

195. Federal jurisdiction under the Clean Water Act extends to all "navigable waters," defined simply as "waters of the United States." *Id.* § 1362(7). Regulations issued by the U.S. Army Corps of Engineers and the Environmental Protection Agency define such waters to include all interstate waters and wetlands, 33 C.F.R. § 328.3(a)(2) (2004), all tributaries and impoundments of such waters, *id.* § 328.3(a)(4), (5), and all waters and wetlands "the use, degradation, or destruction of which *could affect* interstate or foreign commerce," *id.* § 328.3(a)(3) (emphasis added), and wetlands adjacent to such waters, *id.* § 328.3(a)(7).

196. 16 U.S.C. § 1538(a).

The first federal appellate court to address the constitutionality of the ESA's prohibition on "taking" endangered species post-*Lopez* was the U.S. Court of Appeals for the D.C. Circuit in *National Ass'n of Home Builders v. Babbitt*.¹⁹⁷ A sharply divided court upheld the application of the ESA to the Delhi Sands flower-loving fly, an endangered insect of negligible commercial value¹⁹⁸ found only in a handful of counties in a single state. The first three judges to consider the constitutionality of ESA regulations post-*Lopez* adopted three different rationales. The two judges in the majority adopted quite different rationales,¹⁹⁹ while the third judge wrote a powerful dissent.

Judge Wald found that taking the endangered fly substantially affected interstate commerce because the regulation of such activity "prevents the destruction of biodiversity and thereby protects the current and future interstate commerce that relies upon it" and "controls adverse effects of interstate competition."²⁰⁰ Specifically, Judge Wald reasoned that while the loss of any single species might have a negligible or indeterminate effect on interstate commerce, the loss of multiple species, in the aggregate, is certain to have some effect on commerce as biodiversity declines and the natural resource base that it represents dwindles.²⁰¹ Additionally, relying upon the 1981 *Hodel* cases upholding the Surface Mining Control and Reclamation Act,²⁰² Judge Wald found the ESA take prohibition to be a reasonable congressional response to concerns that interstate competition for economic activity would result in a "race-to-the-bottom" and suboptimal levels of environmental protection.²⁰³ Such regulation is constitutional, Judge Wald found, because "Congress has the power under the Commerce Clause to prevent destructive interstate commerce similar to that at issue in this case."²⁰⁴

Judge Henderson, while concurring in the result in *National Ass'n of Home Builders*, embraced somewhat different rationales for upholding the application of the ESA's take prohibition to activities threatening the Delhi fly. Whereas Judge Wald focused on the aggregate impact of species loss on

197. 130 F.3d 1041 (D.C. Cir. 1997). Prior to the *Nat'l Ass'n of Home Builders* case, the U.S. Court of Appeals for the Ninth Circuit upheld the Eagle Protection Act against a Commerce Clause challenge. See generally *United States v. Bramble*, 103 F.3d 1475 (9th Cir. 1996).

198. *Nat'l Ass'n of Home Builders v. Babbitt*, 949 F. Supp. 1, 7-8 (D.D.C. 1996).

199. While Judge Wald claimed to find her "reasoning to be substantially similar" to that of Judge Henderson's concurrence, *Nat'l Ass'n of Home Builders*, 130 F.3d at 1046 n.3, Judge Henderson wrote she could not "agree entirely with either of [Judge Wald's] grounds for reaching the result and instead arrive by a different route." *Id.* at 1057 (Henderson, J., concurring).

200. *Id.* at 1052. Judge Wald, alone, also found the regulation was a constitutional exercise of Congress's power to regulate the channels of interstate commerce. *Id.* at 1046.

201. *Id.* at 1053, n.14.

202. *Hodel v. Virginia*, 452 U.S. 264 (1981); *Hodel v. Indiana*, 452 U.S. 314 (1981).

203. *Nat'l Ass'n of Home Builders*, 130 F.3d at 1054-57.

204. *Id.* at 1057.

interstate commerce, Judge Henderson stressed that "the loss of biodiversity itself has a substantial effect on our ecosystem" and therefore has a substantial effect on interstate commerce.²⁰⁵ For Judge Henderson, the key factor was not the aggregate impact of species loss so much as it was the "interconnectedness of the various species and the ecosystems" and that the loss of any one species necessarily has broader ecological impacts that will, in turn, have a ripple effect upon "land and objects that are involved in interstate commerce."²⁰⁶ Judge Henderson also noted that the regulations themselves, insofar as they regulate economic activity, have a substantial effect on interstate commerce.²⁰⁷

Judge Sentelle dissented on the grounds that Congress's power to regulate interstate commerce cannot extend to those activities—in this case disturbing the habitat of an intrastate species—that are neither interstate nor commerce.²⁰⁸ Noting the divisions among his colleagues,²⁰⁹ Judge Sentelle stressed that the actual regulated activities—killing or otherwise disturbing flies—was not commercial in nature.²¹⁰ He further noted that the underlying logic of his colleagues' opinions would grant Congress near-unlimited power to regulate any activity that could potentially affect some item that could conceivably affect land or things involved in interstate commerce, either alone or in the aggregate, or to adopt any regulation that would, itself, have a substantial effect on commerce.²¹¹ This sort of power without limits is precisely the sort of commerce power the Supreme Court rejected in *Lopez*.

After *Morrison*, the D.C. Circuit again upheld the ESA's constitutionality against a Commerce Clause challenge in *Rancho Viejo v. Norton*, a case

205. *Id.* at 1058 (Henderson, J., concurring).

206. *Id.* at 1059 (Henderson, J., concurring); see also EDWARD O. WILSON, *THE DIVERSITY OF LIFE* 308 (1992) (noting the interconnectedness of species within ecosystems); Myrl L. Duncan, *Property as a Public Conversation, Not a Lockean Soliloquy: A Role for Intellectual and Legal History in Takings Analysis*, 26 ENVTL. L. 1095, 1129 (1996) ("[S]cientists have rediscovered that the world cannot meaningfully be broken down into isolated parts, that every part is connected to every other part."); Johnson, *supra* note 181, at 81 ("It is a fundamental principle of ecology that ecosystems are composed of interdependent parts that play vital roles in preserving the ecosystem.").

207. *Nat'l Ass'n of Home Builders*, 130 F.3d at 1058 (Henderson, J., concurring).

208. *Id.* at 1061 (Sentelle, J., dissenting).

209. *But see id.* at 1065 (Sentelle, J., dissenting) (finding Judge Henderson's biodiversity rationale "indistinguishable in any meaningful way from that of Judge Wald").

210. *Id.* at 1064 (Sentelle, J., dissenting).

211. *Id.* at 1065 (Sentelle, J., dissenting); see also John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174, 180 (1998) ("If Congress can treat all endangered species alike and thereby regulate every species despite its lack of any connection to interstate commerce, then the scope of the Commerce Clause will be truly unlimited."); *id.* at 192 ("[T]he aggregation of all endangered species and the reliance upon the Fly's unknown future effect on interstate commerce become problematic because both arguments would justify any federal legislation.").

involving the Arroyo toad, a species found in parts of Southern California and Mexico.²¹² Here the D.C. Circuit settled on the rationale, drawn from Judge Henderson's concurrence in *National Ass'n of Home Builders*, that the regulation was constitutional because the protection of the Arroyo toad itself "regulates and substantially affects commercial development activity which is plainly interstate."²¹³ Specifically, Judge Garland's opinion for the court noted that the regulated activity in question—"the construction of a 202 acre commercial housing development"—was "plainly an economic enterprise" and could therefore be regulated despite its intrastate character.²¹⁴ Because the ESA take prohibition, as applied to Rancho Viejo's development activities, "regulates and substantially affects commercial development activity," the regulation substantially affects commerce, and is therefore constitutional.²¹⁵

A fundamental problem with the D.C. Circuit's analysis in *Rancho Viejo* is that it focuses on the economic effect of the government regulation itself, rather than that of the regulated activity. This suggests that any federal regulatory statute of broad sweep will be constitutional because of the range of activity it regulates; the more activity a regulation covers, the more likely it is that the regulation itself will have an economic impact, even if the regulated activities are themselves non-economic. In application, this holding produces the perverse result that more expansive federal regulatory statutes are less constitutionally suspect than those of more modest reach.²¹⁶

The *Rancho Viejo* analysis is also in severe tension with *Lopez*. Under the D.C. Circuit's reasoning, Alfonso Lopez's conviction should have been upheld under the Gun Free School Zones Act ("GFSZA") as he had brought

212. 323 F.3d 1062, 1065 (D.C. Cir. 2003). As Professor Mank notes, "*Morrison* and [*Solid Waste Agency v. United States Army Corps of Engineers*] raise[d] additional doubts about whether Judge Wald and Judge Henderson's opinions are consistent with the Supreme Court's narrow reading of the Commerce Power and protectiveness toward traditional state authority." Bradford C. Mank, *Protecting Interstate Threatened Species: Does the Endangered Species Act Encroach on Traditional State Authority and Exceed the Outer Limits of the Commerce Clause?*, 36 GA. L. REV. 723, 760-61 (2002).

213. *Rancho Viejo*, 323 F.3d. at 1067 (quoting *Nat'l Ass'n of Home Builders*, 130 F.3d at 1058 (Henderson, J., concurring)). Although adopting this rationale, the *Rancho Viejo* court sought "not to discredit" alternative rationales, including that species regulation is substantially related to interstate commerce because the loss of biodiversity, in itself, has a substantial effect on commerce. *Id.* at 1067 n.2. It is worth noting, however, that this rationale is drawn almost exclusively from Judge Henderson's concurring opinion and is not the basis upon which Judge Wald asserted there was substantial agreement in the panel majority. *Nat'l Ass'n of Home Builders*, 130 F.3d at 1046 n.3 (Wald, J.) (agreeing with Judge Henderson's statements that "the loss of biodiversity itself has a substantial effect on our ecosystem and likewise on interstate commerce" and that federal regulation of land use under the ESA "has a plain and substantial effect on interstate commerce").

214. *Rancho Viejo*, 323 F.3d at 1068.

215. *Id.* (quoting *Nat'l Ass'n of Home Builders*, 130 F.3d at 1058 (Henderson, J., concurring)).

216. See Adrian Vermeule, *Does Commerce Clause Review Have Perverse Effects?*, 46 VILL. L. REV. 1325, 1325 (2001).

the gun to school as a courier in order to complete a commercial transaction.²¹⁷ Lopez's possession was commercial, yet the Supreme Court struck down the statute because the regulated activity—gun possession—was not and had no more than an attenuated connection to interstate commerce. As the Court noted, the GFSZA “by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms,”²¹⁸ and this was true regardless of whether Lopez possessed the gun for commercial purposes.

Judge Garland's majority opinion in *Rancho Viejo* noted that the undisputed commercial nature of Lopez's gun possession was not referenced in the Supreme Court's *Lopez* opinion; and therefore, “the Supreme Court attached no significance to it.”²¹⁹ That is precisely the point. The Supreme Court attached no significance to the commercial nature of the individual activity in question in *Lopez* when evaluating whether the GFSZA was a valid exercise of Congress's Commerce Clause power. As noted in *Morrison*, the regulated conduct—gun possession in a school zone—was not commercial in character.²²⁰ This was true regardless of the commercial nature of Alfonso Lopez's specific conduct.

As in *Lopez*, the actual regulated activities in *National Ass'n of Home Builders* or *Rancho Viejo*—the take of a Delhi Sands flower-loving fly and an Arroyo toad—are non-economic in nature, and it is unclear that such activities, in themselves, substantially affect commerce. The regulated conduct is that identified by the federal prohibition—possession of a gun in a school zone, gender-motivated violence, taking an endangered species—not the specific character of the individual activity subject to government sanction in a given case.²²¹ In other words, it was not *Rancho Viejo*'s decision to develop property that subjected its actions to the ESA's limitations, but its alleged take of the Arroyo toad. Non-development-related activity that threatens Arroyo toads would remain within the Act's explicit prohibition on unpermitted takes of endangered species. Commercial property development on land not occupied by Arroyo toads, no matter how large, costly, or connected to interstate commerce, would not.

The *Rancho Viejo* court seemed to recognize the nature of the regulated activity when characterizing the statutes at issue in *Lopez* and *Morrison*, but was unable to remain consistent when assessing the constitutionality of the

217. *United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993).

218. *United States v. Lopez*, 514 U.S. 549, 561 (1995) (emphasis added).

219. *Rancho Viejo*, 323 F.3d at 1072.

220. *United States v. Morrison*, 529 U.S. 598, 611 (2000).

221. *See Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1159 (2003) (Sentelle, J., dissenting from denial of rehearing en banc) (“The point of *Lopez*, as further explained in *Morrison*, is not that Congress can regulate any activity if the act of regulating catches an entity or an action that is itself commercial independent of the noncommercial nature of the regulated entity and activity.”).

ESA, where the regulated conduct morphs from that controlled by the ESA, endangered species takes, to Rancho Viejo's commercial construction project.²²² As it is not Rancho Viejo's construction activities that trigger the applicability of the ESA, but the take of an endangered species, so it is the latter that is the regulated activity, and it is that activity that should form the basis of the Commerce Clause analysis.²²³ As the *Rancho Viejo* majority acknowledged, "The ESA regulates takings, not toads."²²⁴ The court could just as easily have said, "The ESA regulates takings, not commercial activity as such." That is to say that the ESA, by its express terms, regulates *any* activity that results in the take of an endangered species, regardless of whether the given activity in a given case can be characterized as "commercial." The Act applies equally to a child who catches an Arroyo toad as a pet as it does to the commercial developer who wishes to build houses in endangered toad habitat.

The rationale adopted in *Rancho Viejo* was considered, and explicitly rejected, by the Fifth Circuit in *GDF Realty Investments, Ltd. v. Norton*.²²⁵ The court noted that there is no basis in the Supreme Court's Commerce Clause jurisprudence, let alone the Clause itself, for holding that Congress may regulate an activity—the taking of an endangered species—"solely because non-regulated conduct (here, commercial development) by the actor engaged in the regulated activity will have some connection to interstate commerce."²²⁶ Such an approach "would allow application of otherwise unconstitutional statutes to commercial actors, but not to non-commercial actors" and would eviscerate any constitutional limit on Congress's authority to regulate intrastate activities, "so long as those subjected to the regulation were entities which had an otherwise substantial connection to interstate commerce."²²⁷ It also mischaracterizes the nature of Congress's regulatory action. By adopting the ESA, Congress "is not directly regulating commercial development" as such, but rather the taking of species.²²⁸ And, as already

222. See *Rancho Viejo*, 323 F.3d at 1076 (noting that regulated activity under the Violence Against Women Act was "gender-motivated violence," and regulated activity in *Lopez* was "possession of a gun in a local school zone," but regulated activity under the ESA for purposes of this case was "a commercial construction project" (internal quotations omitted)).

223. See *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 635 (5th Cir. 2003) ("While the take provision may have prevented the hospital renovations in *NAHB* or the commercial developments in the case at hand, ESA does not *directly* regulate these activities."); see also Stuart Buck, Salerno vs. Chevron: What to do About Statutory Challenges, 55 ADMIN. L. REV. 427, 454 (2003); Nathaniel S. Stewart, Note, *Turning the Commerce Clause on Its Head: Why Federal Commerce Clause Statutes Demand Facial Challenges*, 55 CASE W. RES. L. REV. (forthcoming).

224. *Rancho Viejo*, 323 F.3d at 1072.

225. 326 F.3d 622 (5th Cir. 2003).

226. *Id.* at 634.

227. *Id.*

228. *Id.*

noted, had the Supreme Court adopted such an approach in *Lopez*, the GFSZA would have been upheld.²²⁹

The inconsistency between the D.C. and Fifth Circuits' rationales—and their tension with the Supreme Court's Commerce Clause decisions—was noted by the dissenters from the denial of rehearing en banc in both *Rancho Viejo*²³⁰ and *GDF Realty*.²³¹ *Lopez* and *Morrison* upheld facial challenges to the statutes in question. Under the Supreme Court's test for facial challenges, this means there is no set of facts upon which the statutes could have been upheld.²³² The GFSZA would have been no less unconstitutional if Alfonso Lopez had been a part of a vast interstate gun-dealing ring that happened to sell guns in schools.²³³ Yet the *Rancho Viejo* court implied, and Judge Ginsburg's concurrence made explicit, that the holding should be construed such that Congress may constitutionally regulate the take of endangered species by commercial developers, such as Rancho Viejo itself, but not by a solitary homeowner landscaping his own property or a "lone hiker in the woods."²³⁴ This is flatly inconsistent with the Supreme Court's approach in *Lopez*.²³⁵

The Fifth Circuit's analysis in *GDF Realty* is not without problems of its own, however—a point noted by the six judges who dissented from the denial of en banc review. Rejecting the D.C. Circuit's focus on the economic impact of the regulation itself and whether the plaintiff itself is engaged in economic activity, the Fifth Circuit focused on whether the expressly regulated activity—species takes—has a substantial effect on interstate commerce, either in isolation or in aggregate.²³⁶ Acknowledging that any relationship between commerce and the several cave-dwelling species at

229. See *id.* at 635 (arguing that under such an approach "regulation of gun possession near schools, at issue in *Lopez*, would arguably pass constitutional muster as applied to a possessor who was a significant gun salesman; [and t]herefore, § 922(q)(1)(A) could not have been unconstitutional").

230. *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1159 (D.C. Cir. 2003) (Sentelle, J., dissenting from denial of rehearing en banc); see *id.* at 1160 (Roberts, J., dissenting from denial of rehearing en banc) (noting that the panel's approach "seems inconsistent with the Supreme Court's holdings" in *Lopez* and *Morrison* and "conflicts with the opinion of a sister circuit").

231. *GDF Realty Invs., Ltd. v. Norton*, 362 F.3d 286 (5th Cir. 2004) (denial of petition for rehearing en banc).

232. See *United States v. Salerno*, 481 U.S. 739, 745 (1987); see also Buck, *supra* note 223, at 454–55.

233. See *Rancho Viejo*, 334 F.3d at 1160 (Roberts, J., dissenting from denial of rehearing en banc).

234. *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1077 (D.C. Cir. 2003); *id.* at 1080 (Ginsburg, J., concurring).

235. For this reason, Judge Roberts suggested the court should reconsider sustaining the constitutionality of the ESA on alternative grounds, such as those adopted by the Fifth Circuit in *GDF Realty*. *Rancho Viejo*, 334 F.3d at 1160 (Roberts, J., dissenting from denial of rehearing en banc).

236. *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 633 (5th Cir. 2003).

issue in *GDF Realty* was highly attenuated,²³⁷ the Fifth Circuit focused on the commercial effect of species takes generally, aggregating the economic effect of all species takes as a class.²³⁸ The court characterized the regulation of cave-dwelling species as “part of a larger regulation of activity”—species takes—that Congress could reasonably conclude are economic in nature.²³⁹ Further, the regulation of the cave species is an “essential” part of the overall regulatory scheme, insofar as the ESA’s purpose—the preservation of species diversity—can only be achieved if its protections extend to all endangered species.²⁴⁰ On this basis, the Fifth Circuit concluded the “ESA is an economic regulatory scheme; the regulation of intrastate takes of the Cave Species is an essential part of it. Therefore, Cave Species takes may be aggregated with all other ESA takes.”²⁴¹

This rationale, while possibly more consistent with *Lopez* and *Morrison* than *Rancho Viejo*, nonetheless suggests a near unlimited federal authority to regulate environmental concerns under the Commerce Clause. Yet it is an essential part of *Lopez* and *Morrison* that any viable Commerce Clause rationale must have a stopping point.²⁴² The same reasoning relied upon by the *Rancho Viejo* court would justify an omnibus ecosystem protection act regulating any and all activity with potentially significant ecological impact.²⁴³ It is, after all, a basic ecological postulate, noted by Judge Henderson in *National Ass’n of Home Building*, that all activities have ecological impacts and that due to such effects and interconnections, everything is connected to everything else.²⁴⁴ The same can be said of economic interrelationships. Small changes in economic conditions, no matter how small, can ripple through the sea of interrelationships and

237. The six species at issue were the Bee Creek Cave harvestman, the Bone Creek harvestman, the Tooth Cave pseudoscorpion, the Tooth Cave spider, the Tooth Cave ground beetle, and the Kretschmarr Cave mold beetle. *Id.* at 625, 638 (noting any relationship between the Cave Species and scientific travel or research is “far too attenuated to pass muster”; the possibility of such future effects “is simply too hypothetical and attenuated”; and “Cave species takes are neither economic nor commercial. There is no market for them; any future market is conjecture”).

238. *Id.* at 638.

239. *Id.* at 638–39 (“Aside from the economic effects of species loss, it is obvious that the majority of takes would result from economic activity.”). As the en banc dissenters noted, Congress could have passed a statute prohibiting those engaged in interstate commerce from “taking” endangered species, but did not do so. *GDF Realty Invs., Ltd. v. Norton*, 362 F.3d 286, 291 n.4 (5th Cir. 2004) (denial of petition for rehearing en banc). That is not the statute Congress enacted, however.

240. *GDF Realty*, 326 F.3d at 639–40 (“[O]ur analysis of the interdependence of species compels the conclusion that regulated takes under ESA do affect interstate commerce.”).

241. *Id.* at 640.

242. See, e.g., *United States v. Lopez*, 514 U.S. 549, 564 (1995) (“[I]f we were to accept the Government’s arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.”); see also Berman, *supra* note 105, at 1528.

243. See Nagle, *supra* note 211, at 199.

244. See *supra* note 206 and accompanying text.

exchanges that make up the modern economy. Yet this fact did not justify a broader Commerce Clause power under *Lopez*.²⁴⁵ If some economic relationships—such as that between school safety and education, on the one hand, and future productivity, on the other²⁴⁶—are too attenuated to satisfy the requirements of the Commerce Clause, similarly attenuated ecological connections—such as that between the disturbance or even extinction of a marginal, intrastate species and broader economic impacts—are that much farther beyond Congress's reach. It is incongruous that threats to nearly extinct species have a greater relationship to interstate commerce than threats to human life.²⁴⁷ Yet that is the net result of *GDF Realty*.

The Commerce Clause does not authorize such an all-encompassing regulatory power.²⁴⁸ There is no doubt that ecological conditions can affect commerce substantially and that many (if not most) activities that have a significant ecological impact are motivated by economic considerations. Such an all-encompassing statute could be viewed as an "economic regulatory scheme" as easily as the ESA. Regulation of even relatively small, isolated and intrastate activities would be just as "essential" to the overall regulatory scheme as the regulation of isolated, intrastate species is to the ESA. Yet the Commerce Clause does not reach that far.

Although the Fifth Circuit denied the reasoning of its opinion would "allow Congress to regulate general land use or wildlife preservation," it offered no rationale for why endangered species regulation is somehow more commercial or related to interstate commerce.²⁴⁹ Given the substantial interstate markets in wildlife and wildlife-related activities,²⁵⁰ it would seem

245. See *Lopez*, 514 U.S. at 557; cf. *id.* at 616–17 (Breyer, J., dissenting).

246. See *id.* at 620 (Breyer, J., dissenting).

247. This point is made directly in the *GDF Realty* dissent from denial of rehearing en banc:

Chief Justice Marshall stated in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 5 L. Ed. 257 (1821), that Congress has no general right to punish murder or felonies generally. Surely, though, there is more force to an "interdependence" analysis concerning humans, and thus a more obvious series of links to interstate commerce, than there is to "species." Yet the panel's "interdependent web" analysis of the Endangered Species Act gives these subterranean bugs federal protection that was denied the school children in *Lopez* and the rape victim in *Morrison*.

GDF Realty Invs., Ltd. v. Norton, 362 F.3d 286, 287 (5th Cir. 2004) (Jones, J., dissenting from denial of rehearing en banc).

248. See *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring) ("In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far.").

249. *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 640 (5th Cir. 2003).

250. Justice Stevens noted in *Solid Waste Agency v. United States Army Corps of Engineers*:

In 1984, the U.S. Congress Office of Technology Assessment found that, in 1980, 5.3 million Americans hunted migratory birds, spending \$638 million. More than 100 million Americans spent almost \$14.8 billion in 1980 to watch and photograph fish and wildlife. Of 17.7 million birdwatchers, 14.3 million took trips in order to observe, feed, or photograph waterfowl, and 9.5 million took trips specifically to

that regulation of wildlife preservation generally would fit more easily within the bounds of the Commerce Clause, post-*Lopez*, than the regulation of species for which such markets do not exist.²⁵¹ If “the link between species loss and a substantial commercial effect is not attenuated,”²⁵² then neither is the link between the taking commercially valuable, but non-endangered, wildlife and a substantial commercial effect, nor is the link between ecological degradation generally and a substantial commercial effect. As in *Rancho Viejo*, the logic of the court’s opinion either obliterates the limited nature of Congress’s commerce power, or it creates an implicit environmental exception for the Clause’s otherwise justiciable limits.

The opinion of the U.S. Court of Appeals for the Fourth Circuit in *Gibbs v. Babbitt*²⁵³ can similarly be read to justify an ecological exception to the limits of Congress’s enumerated power to regulate commerce “among the several states.” From the outset, Judge Wilkinson’s majority opinion framed the question as “whether the national government can act to conserve scarce natural resources of value to our entire country,” rather than as whether a given regulatory measure—in this case the ESA’s take prohibition as applied to experimental populations of red wolves reintroduced into North Carolina—is authorized by the Commerce Clause.²⁵⁴ *Gibbs* held that “the regulated activity substantially affects interstate commerce and . . . the regulation is part of a comprehensive federal program,”²⁵⁵ but the decision also repeatedly emphasized the need for federal environmental regulation—to the point of wrongly suggesting that to invalidate the ESA take prohibition would limit federal species-protection efforts to the management of federal lands and leave other environmental concerns to state tort law.²⁵⁶

On the one hand, *Gibbs* can be read narrowly, standing only for the proposition that the prohibition against taking red wolves was within Congress’s Commerce Clause power because red wolves have a substantial

view other water-associated birds, such as herons like those residing at petitioner’s site.

531 U.S. 159, 195 n.17 (2001) (Stevens, J., dissenting) (citations omitted).

251. Nat’l Ass’n of Home Builders v. Babbitt, 130 F.3d 1041, 1064 (D.C. Cir. 1997) (Sentelle, J., dissenting).

252. *GDF Realty*, 326 F.3d at 640.

253. 214 F.3d 483 (4th Cir. 2000).

254. *Id.* at 486.

255. *Id.* at 487.

256. *Id.* at 504, 502. Contrary to Judge Wilkinson’s claims, the federal government would retain authority to directly fund or otherwise encourage species conservation through the spending power and state environmental regulations would be unaffected by judicial limits on the federal commerce power. See *infra* Part V (discussing impact of federalism decisions on environmental protection).

relationship to interstate commerce.²⁵⁷ Wolves are the subject of substantial scientific research and tourism, wolf pelts are a valuable commodity (at least when trade in pelts is permitted), and the motivation for taking wolves—the protection of livestock—is economic.²⁵⁸ On the other hand, Judge Wilkinson's *Gibbs* opinion repeatedly suggests that environmental regulation itself necessarily meets the Commerce Clause requirements²⁵⁹ and that the alternative is to sap "the national ability to safeguard natural resources."²⁶⁰ It is certainly true that "the conservation of scarce natural resources is an appropriate and well-recognized area of federal regulation,"²⁶¹ but this observation does not, by itself, support the conclusion that all such regulation is authorized by the interstate Commerce Clause. The implications of such a doctrine are far-reaching, even if not acknowledged in *Gibbs*. Responding to Judge Luttig's dissent, Judge Wilkinson wrote that the regulation in question "applies only to a single limited area—endangered species," and therefore, the opinion should not be read to grant Congress near-unlimited regulatory authority.²⁶² This limitation is due to Congress's failure to adopt a more expansive statute, however, and not any constitutional limit identified in the *Gibbs* opinion. Like the Fifth Circuit, Judge Wilkinson offers no reason why *the rationale* upon which *Gibbs* relies would not justify more far-reaching federal regulatory measures.²⁶³

While there is no doubt that the conservation of endangered species is an important and popular public policy goal, one can reasonably conclude that the appellate decisions upholding the ESA's take prohibition as against Commerce Clause challenges have shied from a strict application of *Lopez* and *Morrison*.²⁶⁴ This problem is particularly acute in the context of

257. This is also the approach taken by the en banc dissenters in *GDF Realty*. See *GDF Realty Invs., Ltd. v. Norton*, 362 F.3d 286, 291 (5th Cir. 2004) (dissent from denial of rehearing en banc) (noting "many ESA-prohibited takings of endangered species may be regulated, and even aggregated, under *Lopez* and *Morrison* because they involve commercial or commercially related activities like hunting, tourism and scientific research").

258. *Gibbs*, 214 F.3d at 492–95.

259. See, e.g., *id.* at 496 ("Congress is entitled to make the judgment that conservation is potentially valuable, even if that value cannot be presently ascertained."); *id.* ("[I]t is for Congress to choose between inaction and preservation, not for the courts."); *id.* at 498 ("[G]iven that Congress has the ability to enact a broad scheme for the conservation of endangered species, it is not for the courts to invalidate individual regulations.").

260. *Id.* at 505. Indeed, Judge Wilkinson specifically criticizes Judge Luttig's dissent for failing to consider "the national interest in the development of natural resources" as part of his Commerce Clause analysis. *Id.*

261. *Id.* at 500.

262. *Id.* at 503.

263. In this respect the *Gibbs* opinion implicitly adopts the "political safeguards" approach to federalism that formed the basis for the *Garcia* opinion, but which has been explicitly rejected by the Supreme Court's more recent federalism cases. See Yoo, *supra* note 68, at 1318–21.

264. See, e.g., Nagle, *supra* note 211, at 191 (noting that there are many ways to affirm federal jurisdiction over endangered species habitats, "[b]ut only if one is willing to abandon

endangered species because those species that are most endangered are more likely to subsist in only one state and are least likely to be the objects of commerce.²⁶⁵ The rationales set forth by the various courts, while appealing, are inconsistent with the Supreme Court's stated approach. At a minimum they suggest that Commerce Clause limitations should be enforced less stringently in the context of environmental protection. For these decisions to stand, the Court would either need to identify an additional, and more compelling, basis for finding such regulations within the bounds of the Commerce Clause, or else retreat from the essential holdings of *Lopez* and *Morrison*, even if only to create a *de facto* Commerce Clause exception for environmental concerns.

There is some reason to believe the Court might just take such a course. Justice Kennedy, concurring in *Lopez* with Justice O'Connor, stressed that the Court should be sensitive to how a more stringent application of Commerce Clause limitations could upset settled expectations.²⁶⁶ He further paid substantial attention to the potential practical effects of striking down the GFSZA.²⁶⁷ While there is reason to believe that the environmental impacts of judicial curtailment of the federal commerce power would be less significant than commonly supposed,²⁶⁸ this argument might not be sufficient to assuage the concerns of at least some of the justices that have, thus far, signed onto a reinvigoration of the Commerce Clause. As it would take only one defector from the *Lopez* majority to limit the environmental reach of the Court's current Commerce Clause doctrine, it would be premature to predict any broader impact on environmental policy, regardless of the doctrine's underlying force.

b. Clean Water Act Jurisdiction

While the Supreme Court has yet to address the implications of its modern Commerce Clause jurisprudence on environmental regulation directly, that jurisprudence has caused the court to curtail federal jurisdiction under the Clean Water Act by adopting a narrow construction of the statute itself.²⁶⁹ In *Solid Waste Agency v. United States Army Corps of*

the Court's insistence in *Lopez* that an appropriate test for the Commerce Clause cannot justify federal legislation of everything").

265. *Id.* at 205 ("The very fact that a species has become endangered maximizes the likelihood that the species lives in only one state and that there is no commerce in the species."). Indeed, where species, or products derived therefrom, have substantial commercial value, there are incentives to propagate and protect the species. See generally WILDLIFE IN THE MARKETPLACE (Terry L. Anderson & P.J. Hill eds., 1995).

266. *United States v. Lopez*, 514 U.S. 549, 574 (1995) (Kennedy, J., concurring).

267. *Id.* at 581 (noting that most states already prohibited guns in schools).

268. See *infra* Part V (discussing impact of federalism decisions on environmental protection).

269. 33 U.S.C. §§ 1252-1385 (2000).

Engineers,²⁷⁰ a regional waste management agency challenged the extension of federal regulatory authority over land containing permanent and seasonal ponds. Because the waters in question were isolated, and neither adjacent to nor hydrologically connected to navigable waters, the Solid Waste Agency of Northern Cook County ("SWANCC") contended that the land in question lay beyond the reach of federal regulation. The petitioners pressed their case on both constitutional and statutory grounds. The Court only reached the latter, citing federalism concerns—specifically the concern that a broad interpretation of the CWA would "push the limit of congressional authority" under the Commerce Clause²⁷¹—to hold that the Act did not reach isolated, intrastate waters. The Court refused to adopt a more expansive interpretation of the Act absent a "clear indication that Congress intended that result."²⁷² By resolving the issue on statutory grounds, the Court avoided the need to address the extent to which Congress could regulate the use of isolated waters were it to adopt legislation explicitly for that purpose.²⁷³

The impact of *Solid Waste Agency* on federal regulation is potentially significant.²⁷⁴ At the very least the decision frees isolated, intrastate waters from federal jurisdiction, particularly where the only basis for asserting such jurisdiction is the actual or potential presence of migratory birds. Consequently many prairie potholes and other isolated wetlands and waters will no longer be subject to federal permitting requirements under § 404 of the Clean Water Act.²⁷⁵ Yet the precise limits *Solid Waste Agency* imposed on federal jurisdiction under the CWA are unclear. In January 2003, the Army Corps and the EPA issued an advance notice of proposed rulemaking to clarify the scope of regulatory jurisdiction under the CWA.²⁷⁶ They issued a

270. 531 U.S. 159 (2001).

271. *Id.* at 173.

272. *Id.* at 172. In so doing, the Court rejected the argument that the Corps of Engineers' regulation was due deference under *Chevron USA v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Although courts will generally defer to federal agency interpretations of ambiguous statutory language, the *Solid Waste Agency* majority found such deference to be inappropriate "where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." 531 U.S. at 173.

273. The dissent, on the other hand, did address the Commerce Clause issue and found the regulations in question to lie well within the outer limits of federal Commerce Clause authority. *Solid Waste Agency*, 531 U.S. at 181–82 (Stevens, J., dissenting).

274. See Bradford C. Mank, *The Murky Future of the Clean Water Act after SWANCC: Using a Hydrological Connection Approach to Saving the Clean Water Act*, 30 *ECOLOGY L.Q.* 811, 884 (2003) (noting that *Solid Waste Agency* requires a "significant nexus," and therefore, not just "any" hydrological connection will suffice to establish federal jurisdiction under the CWA); Lance D. Wood, *Don't Be Misled: CWA Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and to Their Adjacent Wetlands*, 34 *ENVTL. L. REP.* 10,187, 10,189, 10,195 (2004) (noting "potentially disastrous" and "catastrophic" effects of some potential interpretations of *Solid Waste Agency*).

275. 33 U.S.C. § 1344 (2000).

276. Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 *Fed. Reg.* 1991 (Jan. 15, 2003).

joint memorandum containing advance notice prohibiting the assertion of regulatory jurisdiction over isolated waters based upon the presence of migratory birds.²⁷⁷ This announcement came under heavy criticism from environmental organizations, which asserted that no rulemaking on the extent of CWA jurisdiction was necessary.²⁷⁸ In December 2003, the Army Corps and EPA announced they would not issue a new rulemaking.²⁷⁹ In the meantime, there has been substantial uncertainty as to the current scope of federal regulatory jurisdiction under the CWA.²⁸⁰ A study by the General Accounting Office found that Army Corps district offices' jurisdictional determinations have varied significantly since *Solid Waste Agency*.²⁸¹

Due to *Solid Waste Agency*'s ambiguous reach, a circuit split over the meaning of the case rapidly emerged. Several circuits, including the Fourth,²⁸² Sixth,²⁸³ and Seventh,²⁸⁴ have read *Solid Waste Agency* narrowly to preclude only federal regulation of isolated, intrastate, non-navigable waters. This is also the view adopted by the EPA and the Army Corps of Engineers.²⁸⁵ The

277. *Id.* at 1995 app. A.

278. U.S. GAO, WATERS AND WETLANDS: CORPS OF ENGINEERS NEEDS TO EVALUATE ITS DISTRICT OFFICE PRACTICES IN DETERMINING JURISDICTION 14 (2004) [hereinafter GAO, *Wetlands*]. The GAO further reported that 99% of the comments received by EPA and the Army Corps opposed a new rulemaking on CWA jurisdiction. *Id.*

279. See Eric Pianin, *EPA Scraps Changes To Clean Water Act; Plans Would Have Reduced Protection*, WASH. POST, Dec. 17, 2003, at A20. One reason given by the Army Corps and EPA to forego the rulemaking was that federal courts had narrowly interpreted *Solid Waste Agency*'s impact. Ironically, on the same day as the Army Corps/EPA announcement, the U.S. Court of Appeals for the Fifth Circuit held that such narrow interpretations of *Solid Waste Agency* were "unsustainable." Daniel Simmons, *Navigating SWANCC: An Examination of the U.S. Army Corps of Engineers' Authority Under the Clean Water Act*, 34 ENVTL. L. REP. 10,723, 10,730 (2004) (citing *In re Needham*, 354 F.3d 340, 345 (5th Cir. 2003)).

280. See, e.g., *Federal Authority to Require Wetland Dumping Permits: Hearing on H.R. 5194 Before the House Comm. on Energy Policy, Natural Resources and Regulatory Affairs* (2002) (statement of Patrick Parenteau, Professor of Law, Vermont Law School) ("The decision has created substantial uncertainty regarding the geographic jurisdiction of the Clean Water Act."); PAT PARENTEAU, ASS'N OF STATE WETLAND MANAGERS, POSITION PAPER ON CLEAN WATER ACT JURISDICTION DETERMINATIONS PURSUANT TO THE SUPREME COURT'S JAN. 9, 2001 DECISION, *SOLID WASTE AGENCY OF NORTHERN COOK COUNTY V. U.S. ARMY CORPS OF ENG'RS* (2001) ("The section 404 regulatory program has been in turmoil ever since the Supreme Court's *SWANCC* decision."); Wood, *supra* note 274, at 10,189 (noting that *Solid Waste Agency* was "ambiguous" and courts have been "inconsistent" in their interpretations of the decision).

281. GAO, *Wetlands*, *supra* note 278, at 3 ("Corps districts differ in how they interpret and apply the federal regulations when determining what wetlands and other waters fall within the jurisdiction of the federal government.").

282. See *United States v. Deaton*, 332 F.3d 698, 709–12 (4th Cir. 2003).

283. See *United States v. Rapanos*, 339 F.3d 447, 453 (6th Cir. 2003).

284. See *United States v. Rueth Dev. Co.*, 335 F.3d 598, 604–05 (7th Cir. 2003).

285. See Memorandum from Gary S. Guzy, General Counsel, U.S. Environmental Protection Agency, & Robert M. Andersen, Chief Counsel, U.S. Army Corps of Engineers, to the Assistant Administrator for Water and Others, Supreme Court Ruling Concerning CWA Jurisdiction over Isolated Waters (Jan. 19, 2001) (on file with the Iowa Law Review); see also Wood, *supra* note 274.

Fifth Circuit, on the other hand, has read *Solid Waste Agency* more broadly to exclude waters that are neither navigable themselves nor adjacent to navigable waters.²⁸⁶ Specifically, in the Fifth Circuit, federal jurisdiction under the CWA does not extend to wetlands, “puddles, sewers, roadside ditches and the like,” if such waters are not truly adjacent to navigable waters.²⁸⁷ According to the Fifth Circuit, the interpretation adopted by the other circuits “is unsustainable under [*Solid Waste Agency*]” as the CWA is “not so broad as to permit the federal government to impose regulations over ‘tributaries’ that are neither themselves navigable nor truly adjacent to navigable waters.”²⁸⁸

While it is too early to evaluate the full impact of *Solid Waste Agency* on federal regulatory jurisdiction, some things are clear. *Solid Waste Agency* reaffirms the principle that “where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise,” such as whether Congress can regulate a given activity under the Commerce Clause, “and by the other of which such questions are avoided,” a court’s “duty is to adopt the latter.”²⁸⁹ Whereas courts once adopted expansive interpretations of federal jurisdiction so as to effectuate the broad purposes of federal environmental statutes, now such laws are to be construed in a narrower fashion. Applying *Solid Waste Agency* to statutes that contain a jurisdictional element—such as a requirement that the specific activity to be regulated substantially affect interstate commerce—should result in narrowing the scope of such statutes without questioning their constitutionality. An explicit jurisdictional requirement can expressly limit a statute’s reach to those activities clearly within Congress’s authority, thereby insulating a statute from a potential Commerce Clause challenge.

c. Summary

Congress retains substantial Commerce Clause authority to regulate economic activities and their environmental impacts. Recent precedents do not undermine federal statutes that explicitly regulate commercial or industrial activity, such as mining or asbestos removal, as such. While the logic of *Lopez* and *Morrison* suggests limitations on Congress’s ability to authorize the regulation of non-economic activity and the environmental impacts of such activity, lower courts have not been eager to enforce such

286. See *In re Needham*, 354 F.3d 340, 345–46 (5th Cir. 2003); *Rice v. Harken Exploration Co.*, 250 F.3d 264, 272 (5th Cir. 2001). Although *Needham* and *Rice* specifically address the scope of federal regulation over “waters of the United States” under the Oil Pollution Act, both decisions note that federal jurisdiction under the OPA was intended to be coextensive with that under the Clean Water Act. *Needham*, 354 F.3d at 344; *Rice*, 250 F.3d at 267.

287. *Needham*, 354 F.3d at 345.

288. *Id.* Some government officials and commentators dismiss this language as dicta. See, e.g., Wood, *supra* note 274, at 10,188.

289. *Jones v. United States*, 529 U.S. 848, 858 (2000).

limits. There is no indication that the Commerce Clause opinions will be read to curtail federal ability to regulate documented interstate environmental impacts, such as pollution spillovers. The Commerce Clause opinions have resulted in a narrowing of Clean Water Act jurisdiction, however, and may result in similar narrowing interpretations of other federal statutes with commerce-based jurisdictional requirements—though few environmental statutes fall into this category. This would result in the exclusion of some non-economic, intrastate activity from congressional regulation, but is unlikely to impact efforts to directly regulate the environmental impacts of industrial and commercial activity, as such.

2. Section 5 of the Fourteenth Amendment

Judicial limits on the scope of Congress's power under section 5 of the Fourteenth Amendment have had no impact on existing environmental regulation and should not have much impact in the future. To date, Congress has not relied upon section 5 as the constitutional basis for any significant environmental legislation. Environmental laws are generally not conceived as efforts to enforce the Fourteenth Amendment's equal protection and due process guarantees. Yet even if Congress was to adopt environmental laws predicated on the section 5 power, the substantive limitations on this power articulated in *Boerne* and subsequent cases could well constrain future efforts to enact federal environmental legislation pursuant to the Fourteenth Amendment, including efforts to abrogate state sovereign immunity. *Boerne* and its progeny make the Fourteenth Amendment an unsuitable home for existing environmental measures.²⁹⁰

Perhaps the greatest potential impact of the narrowing of Congress's section 5 power is that Congress could be less able to adopt legislation to address "environmental justice" concerns, such as allegations that pollution and environmentally damaging activities disproportionately affect communities of color.²⁹¹ No private plaintiff has brought a successful

290. It is possible that section 5 power could be used to authorize federal legislation prohibiting state-created nuisances, as such actions could be conceived as either a deprivation of property without due process or a taking of private property without just compensation. See *McAllister & Glicksman*, *supra* note 173, at 10,675. While the latter prohibition is found in the Fifth Amendment, it is enforceable against the states via the Fourteenth. *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 238–39 (1896).

291. See generally UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR (Robert D. Bullard ed., 1994); Regina Austin & Michael Schill, *Black, Brown, Poor and Poisoned: Minority Grassroots Environmentalism and the Quest for Eco-Justice*, 1 KAN. J.L. & PUB. POL'Y, 69 (1991); Robert D. Bullard, *The Legacy of American Apartheid and Environmental Racism*, 9 ST. JOHN'S J. LEGAL COMMENT. 445 (1994); Robert D. Bullard, *The Threat of Environmental Racism*, 7 NAT. RESOURCES & ENV'T 23 (1993); Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619 (1992). Note that the claims are hotly contested. Vicki Been, *What's Fairness Got to Do With It?: Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1009–15 (1993); Vicki Been & Francis Gupta, *Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of*

environmental justice claim under the Fourteenth Amendment, as it is exceedingly difficult to demonstrate discriminatory intent.²⁹² Prior to the Supreme Court's recent federalism cases—and parallel cases limiting private causes of action under Title VI of the Civil Rights Act²⁹³—it was conceivable that Congress, or perhaps even a federal agency, could adopt environmental justice measures under the Fourteenth Amendment. For example, Congress could have prohibited state facility siting and environmental permitting decisions that have a disproportionate harm on minority communities or that exacerbate existing imbalances in the environmental burden of industrial development. The Supreme Court does not recognize the disparate impact of a government action on minority communities, in itself, as a violation of the Fourteenth Amendment's equal protection guarantee, however.²⁹⁴ For this reason, the Court would likely strike down such legislation as in excess of Congress's section 5 power.

Insofar as section 5 of the Fourteenth Amendment provides the only enumerated power authorizing Congress to abrogate state sovereign immunity, judicially enforced limits on the section 5 power will curtail Congress's ability to subject states to suits for environmental violations.²⁹⁵ It is possible that only those environmental violations, or actions taken on environmentally related matters, that could themselves be construed as violations of rights protected by the Fourteenth Amendment itself could be subject to such suits. Although Congress may adopt prophylactic legislation to prevent potential Fourteenth Amendment violations by state actors, under *Boerne* such measures must be proportional and congruent.

B. STATE SOVEREIGNTY

Whereas limits on Congress's enumerated powers constrain Congress's ability to regulate certain types of environmental harms, the Supreme Court's state sovereignty decisions largely affect the *means* Congress may use to address specific environmental concerns. At one level, these restrictions are significant in that they represent strict prohibitions against the adoption of certain types of environmental measures. On the other hand, the formal nature of these rules makes it easier for Congress to adopt alternative means of addressing a given environmental concern. Whereas a Supreme Court decision substantially curtailing Congress's commerce power could leave

Environmental Justice Claims, 24 *ECOLOGY L.Q.* 1, 34–35 (1997); Thomas Lambert & Christopher Boerner, *Environmental Inequity: Economic Causes, Economic Solutions*, 14 *YALE J. ON REG.* 195, 195–212 (1997).

292. See Craig Anthony Arnold, *Planning Milagros: Environmental Justice & Land-Use Regulation*, 76 *DENV. U. L. REV.* 1, 51 (1998).

293. See generally *Alexander v. Sandoval*, 532 U.S. 275 (2001).

294. See *Washington v. Davis*, 426 U.S. 229, 238–39 (1976); *Hernandez v. New York*, 500 U.S. 352, 360 (1991).

295. See *infra* notes 363–64 and accompanying text.

certain activities completely beyond Congress's regulatory reach, there are relatively few environmental programs that are threatened by the Court's recent efforts to protect state sovereignty against federal encroachment.

1. Commandeering

The potential commandeering of state government officials by federal environmental regulation is not new. In the 1970s, the EPA directed states to adopt specific air pollution control measures under the Clean Air Act.²⁹⁶ The EPA maintained that it could obtain injunctive relief ordering uncooperative state officials to adopt a particular type of vehicle emission inspection program and other emission control measures.²⁹⁷ This claim was generally rejected in the courts of appeals, however.²⁹⁸ The courts ultimately relied on statutory language to reject the EPA's claims, but noted the serious constitutional questions about the EPA's position.²⁹⁹ In particular, the courts separated federal efforts to control pollution from industrial sources that impact state-run facilities from federal efforts to directly conscript state officers in the administration of a federal program. As the D.C. Circuit noted, the EPA was "attempting to commandeer the regulatory powers of the states, along with their personnel and resources, for use in administering and enforcing a federal regulatory program against the owners of motor vehicles."³⁰⁰ Upholding such an assertion of federal regulatory authority, the Ninth Circuit noted, would have endorsed "[a] Commerce Clause power so expanded [that it] would reduce the states to puppets of a ventriloquist Congress."³⁰¹ Such a power "would enable Congress to control ever increasing portions of the states' budgets. The pattern of expenditures would increasingly become a congressional responsibility."³⁰²

296. See, e.g., *Maryland v. EPA*, 530 F.2d 215, 218 (4th Cir. 1975), *vacated sub nom.* *EPA v. Brown*, 431 U.S. 99 (1977); *District of Columbia v. Train*, 521 F.2d 971, 977 (D.C. Cir. 1975), *vacated sub nom.* *EPA v. Brown*, 431 U.S. 99 (1977); *Brown v. EPA*, 521 F.2d 827, 829 (9th Cir. 1975), *vacated*, 431 U.S. 99 (1977).

297. *Brown*, 521 F.2d at 831.

298. *Maryland*, 530 F.2d 215; *Train*, 521 F.2d at 971; *Brown*, 521 F.2d at 827. A fourth federal appellate court found in favor of the EPA. *Pennsylvania v. EPA*, 500 F.2d 246, 246-47 (3d Cir. 1974).

299. *Brown*, 431 U.S. at 102 ("All of the courts rested on statutory interpretation, but noted also that serious constitutional questions might be raised if the statute were read as the United States argued it should be.").

300. *Train*, 521 F.2d at 993.

301. *Brown*, 521 F.2d at 839.

302. *Id.* at 840. The Ninth Circuit further made clear that its holding did not limit the federal government's ability to induce state cooperation, such as through the spending power, or to preempt state pollution control laws with more stringent federally enforced requirements. *Id.*; see also *Maryland*, 530 F.2d at 228 ("Inviting Maryland to administer the regulations, and compelling her to do so under threat of injunctive and criminal sanctions, are two entirely different propositions."); *Train*, 521 F.2d at 989 (reaffirming federal power to preempt inconsistent state regulations).

The Supreme Court accepted petitions for certiorari to consider whether the EPA could constitutionally commandeer state regulatory officials pursuant to the Clean Air Act. Yet before the Court ruled on the question, the federal government acknowledged that its regulations were invalid and the decisions were vacated.³⁰³ There is little doubt that if the cases were litigated today, the EPA's effort to conscript state and local officials would constitute unconstitutional commandeering.

The Supreme Court next considered the constitutional limits on commandeering in *New York v. United States*,³⁰⁴ a challenge to the Low Level Radioactive Waste Policy Amendments Act in which the Court clearly articulated the anti-commandeering principle. Since *New York*, state and local governments have raised Tenth Amendment claims with some frequency. Although *New York* is the principal commandeering case, and it concerned environmental matters, the anti-commandeering principle it announced has had a minimal effect on federal environmental regulation. The federal government rarely issues direct commands requiring state and local government officials to implement federal regulatory programs. Rather, state cooperation with and participation in federal regulatory efforts is induced through promises of funding and threats of preemption—measures that the Court explicitly endorsed in *New York*. Such measures may place substantial pressure on state and local officials to follow the federal government's lead in environmental policy, but they are not, in themselves, commandeering.³⁰⁵ For this reason, most commandeering-based challenges to environmental regulations have failed.

Since *New York*, there have been only two successful commandeering claims brought against federal environmental regulations, both involving exceedingly peripheral federal regulations.³⁰⁶ In 1993, the U.S. Court of Appeals for the Ninth Circuit invalidated provisions of the Forest Resources Conservation and Shortage Relief Act ("FRCSRA").³⁰⁷ This law sought to limit the export of unprocessed logs from forests in the western United States.³⁰⁸ Yet rather than impose direct restrictions on timber exports, the FRCSRA ordered states to adopt their own regulations restricting exports. In

303. *Brown*, 431 U.S. at 103–04.

304. 505 U.S. 144 (1992). During the intervening years, the Court considered Tenth Amendment-based challenges to several federal statutes, but it did not directly address the commandeering question. *See, e.g.*, *Fed. Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 743 (1982); *Hodel v. Va. Surface Mining & Recreation Ass'n*, 452 U.S. 264, 265 (1981); *see also supra* Part II.B.

305. *But see infra* Part IV.

306. *See Ass'n of Cmty. Orgs. for Reform Now v. Edwards*, 81 F.3d 1387, 1387 (5th Cir. 1996); *Bd. of Natural Res. v. Brown*, 992 F.2d 937, 938 (9th Cir. 1993). These decisions are discussed in greater detail in Adler, *supra* note 45, at 609–12.

307. *Brown*, 992 F.2d at 938.

308. The FRCSRA's export restrictions only applied to government lands in the continental United States west of the 100th meridian. 16 U.S.C. § 620c (2000); *see Brown*, 992 F.2d at 941.

Board of Natural Resources v. Brown, the Ninth Circuit held that these provisions were "direct commands to the states to regulate according to Congress's instructions" and thus constituted unconstitutional commandeering under *New York*.³⁰⁹

Brown did not have a significant impact, environmental or otherwise. Following the Ninth Circuit's decision, Congress amended the FRCSRA to require the Secretary of Commerce to issue federal regulations directly limiting the export of unprocessed logs.³¹⁰ Even if Congress had not responded to *Brown* in this manner, the environmental effect would have been minimal. While styled as a "conservation" measure, it is doubtful that Congress enacted FRCSRA to conserve western state forests.³¹¹ Rather, the FRCSRA's export provisions appear designed to protect domestic lumber mills from foreign competition. By restricting the export of unprocessed logs, the FRCSRA effectively mandated that local timber be processed in local mills, even if the timber were bound for foreign markets and overseas mills were more efficient.³¹²

In 1996, the U.S. Court of Appeals for the Fifth Circuit invalidated another rather minor federal environmental provision on anti-commandeering grounds.³¹³ The Lead Contamination Control Act ("LCCA")³¹⁴ required each state to "establish a program . . . to assist local educational agencies in testing for, and remedying, lead contamination in drinking water."³¹⁵ The Fifth Circuit held that this provision fell "squarely within the ambit of *New York*" and was therefore unconstitutional.³¹⁶ If Congress sought to ensure the regulation of potential lead contamination in school water coolers, it would have to adopt legislation implementing such a

309. See *Brown*, 992 F.2d at 947. At the same time, the Ninth Circuit rejected claims that the FRCSRA violated the due process clause of the Fifth Amendment and federal obligations to state land grant trusts. *Id.* at 942-46.

310. See 16 U.S.C. §§ 620c-620d.

311. For this reason, some may object to the characterization of *Brown* as an environmental case. See Percival, *supra* note 4, at 841 (stating that only one federal environmental statute has been successfully challenged on commandeering grounds).

312. The FRCSRA may be a particularly obvious example of ostensibly "environmental" legislation adopted primarily for the benefit of economic interests, but it is hardly unique. See generally Jonathan H. Adler, *Clean Politics, Dirty Profits: Rent-Seeking Behind the Green Curtain*, in POLITICAL ENVIRONMENTALISM: GOING BEHIND THE GREEN CURTAIN (Terry L. Anderson ed., 2000); Todd J. Zywicki, *Environmental Externalities and Political Externalities: The Political Economy of Environmental Regulation and Reform*, 73 TUL. L. REV. 845 (1999).

313. *Ass'n of Cmty. Orgs. for Reform Now v. Edwards*, 81 F.3d 1387, 1387 (5th Cir. 1996).

314. 42 U.S.C. §§ 300j-21 to -26 (2000).

315. *Id.* § 300j-24(d).

316. *Ass'n of Cmty. Orgs. for Reform Now*, 81 F.3d at 1394 ("Because § 300j-24(d) deprives States of the option to decline regulating non-lead free drinking water coolers, we . . . conclude that § 300j-24(d) is an unconstitutional intrusion upon the States' sovereign prerogative to legislate as it sees fit.").

program at the federal level, or else provide states with a financial or other incentive to adopt such programs themselves.³¹⁷

All other commandeering challenges to federal environmental laws have failed.³¹⁸ In 1997, the U.S. Court of Appeals for the Second Circuit questioned the constitutionality of a CERCLA provision setting a "federally required commencement date" ("FRCD") for the running of the applicable state statute of limitations governing personal injury claims arising from the improper storage or disposal of hazardous wastes.³¹⁹ Although not deciding the question, in dicta, the court observed that the CERCLA provision was of "questionable constitutionality" because it "appears to purport to change state law" and might therefore violate anti-commandeering principles.³²⁰ In a subsequent case, however, this claim was raised and rejected.³²¹ The FRCD does not conscript the state legislature or executive officials to implement a federal regulatory program.³²² Rather, it simply requires state courts to recognize that state-law toxic tort claims do not accrue before a plaintiff knows, or reasonably should know, of her injury.³²³ This is a "modest requirement that is squarely within Congress's long established powers under the Supremacy Clause of the Constitution."³²⁴

While the FRCSRA and the LCCA are the only federal environmental statutes to be successfully challenged on commandeering grounds since *New*

317. The *Ass'n of Cmty. Orgs. for Reform Now* decision also addressed an LCCA provision requiring states to disseminate information about potential lead contamination in water coolers. 81 F.3d at 1390-92; 42 U.S.C. § 300j-24(c). The court did not assess the constitutionality of this provision, however, as it determined that the state had effectively complied with this provision. *Ass'n of Cmty. Orgs. for Reform Now*, 81 F.3d at 1392. Even though the requirement of this provision was largely ministerial, it would likely have been judged equally unconstitutional had the court had cause to reach the issue.

318. See, e.g., *City of Abilene v. EPA*, 325 F.3d 657, 657-58 (5th Cir. 2003) (rejecting a Tenth Amendment challenge to conditions placed on storm water discharge permits); *Env'tl. Def. Ctr. v. EPA*, 319 F.3d 398, 409 (9th Cir. 2003) (rejecting a Tenth Amendment challenge to permitting requirements of small municipal storm sewer discharges); *Virginia v. Browner*, 80 F.3d 869, 882-91 (4th Cir. 1996) (rejecting a Tenth Amendment challenge to Clean Air Act requirements for state implementation plans); *Sweat v. Hull*, 200 F. Supp. 2d 1162, 177-80 (D. Ariz. 2001) (rejecting a Tenth Amendment defense of a state's unilateral decision to terminate pollution controls provided for in state implementation plans under the Clean Air Act); *Missouri v. United States*, 918 F. Supp. 1320, 1337 (E.D. Mo. 1996) (rejecting a Tenth Amendment challenge to Clean Air Act requirements for state implementation plans); see also Percival, *supra* note 4, at 841 ("[C]ourts have had little difficulty rejecting state claims of commandeering when federal regulatory programs are challenged.").

319. *ABB Indus. Sys., Inc. v. Prime Tech., Inc.*, 120 F.3d 351, 360 n.5 (2d Cir. 1997).

320. *Id.*

321. *Freier v. Westinghouse Elec. Corp.*, 303 F.3d 176, 178 (2d Cir. 2002).

322. *Id.* at 204.

323. *Id.*

324. *Id.* The anti-commandeering principle generally does not apply to state judiciaries. Rather, as the Supreme Court held in *New York*, "this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause." *New York v. United States*, 505 U.S. 144, 178-79 (1992); see also *Testa v. Katt*, 330 U.S. 386, 394 (1947).

York, there are a handful of other environmental provisions that appear to be quite vulnerable to similar challenges. Dissenting in *Printz*, Justice Stevens identified sections of two environmental laws that mandate state participation in federal regulatory schemes.³²⁵ In addition, the interpretation of federal environmental statutes to impose affirmative regulatory obligations on states could also raise commandeering concerns.³²⁶

In this context, the Emergency Planning and Community Right-to-Know Act ("EPCRA")³²⁷ is perhaps the most vulnerable federal environmental statute.³²⁸ This law is designed to inform local communities about the use, storage, and disposal of various chemical substances and potentially hazardous materials, as well as to ensure that local governments engage in emergency planning to reduce the environmental risks that such materials and industrial facilities may pose to local communities. Unlike most federal environmental statutes that enlist state and local governments, however, EPCRA does not follow the cooperative federalism model. Rather, it explicitly commands each state's governor to create a "state emergency response commission" and then imposes a series of duties upon such commissions, including the creation of local emergency planning committees and the development of emergency response plans.³²⁹ These requirements contravene the principle that "[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."³³⁰

In 1986, Congress added provisions to the underground storage tank ("UST") provisions of the federal Resource Conservation and Recovery Act of 1976 ("RCRA").³³¹ These provisions are also vulnerable to challenge. Whereas most of the RCRA, including the bulk of the UST provisions, adopt a traditional cooperative federalism model, the 1986 amendments dictate to the states. Specifically, they include a provision requiring every state to develop inventories "of all underground storage tanks... containing regulated substances"³³² and to submit these inventories to the federal EPA.³³³ Unlike the other requirements of state UST programs, these

325. See *Printz v. United States*, 521 U.S. 898, 955 (1997) (Stevens, J., dissenting).

326. See *infra* notes 337–46 and accompanying text.

327. 42 U.S.C. § 11001 (2000).

328. See generally Nicholas J. Johnson, *EPCRA's Collision with Federalism*, 27 IND. L. REV. 549 (1994).

329. See 42 U.S.C. §§ 11001(a)–(c), 11003 (e), 11022(a), 11022(e) (3).

330. *Printz*, 521 U.S. at 935. See also Johnson, *supra* note 328, at 563 ("It is difficult to avoid the conclusion that the commission and the committees are state regulatory agencies.").

331. 42 U.S.C. §§ 6901–6902 (2000).

332. *Id.* § 6991a(c).

333. *Id.* Owners of USTs are further required to submit information to the state or local agencies designated by the state's governor to receive such information. See *id.* § 6991a(a)(1), (b)(1).

provisions are not discretionary.³³⁴ Because they commandeer state officials to implement federal regulatory requirements, they are unconstitutional.

Without a doubt, the relevant EPCRA provisions and RCRA's UST inventory requirement impose no more than an incidental burden upon state governments—and therefore it is unlikely that a state will challenge either provision in federal court.³³⁵ Yet the relative unobtrusiveness of a federal requirement does not insulate a federal provision from the anti-commandeering principle. The *Printz* majority held that “no case-by-case weighing of the burdens or benefits is necessary” when adjudging the constitutionality of a federal command to a state government as it struck down the background check provisions of the Brady Act.³³⁶ This does not bar Congress from pursuing these policy objectives, however. As with the provisions struck down in *Ass'n of Community Organizations for Reform Now and Brown*, it would be relatively easy for Congress to amend the relevant statutes to achieve the same objectives, either by mandating direct federal regulation or providing incentives for state cooperation.

In some circumstances, the application of the Endangered Species Act (“ESA”) to state regulatory programs may also be vulnerable to challenge on commandeering grounds, particularly insofar as the ESA is read to impose affirmative regulatory obligations on state agencies. In *Strahan v. Cox*, a federal district court issued an injunction requiring the State of Massachusetts to regulate gillnet and lobster pot fishing in state waters so as to prevent the incidental taking of an endangered species.³³⁷ The court accepted the plaintiff's claim that the state's licensing of gillnet and lobster pot fishing resulted in illegal “takes” of Northern Right whales in violation of the ESA. According to the court, insofar as the state exercised “control over the use of gillnets and lobster gear in Massachusetts waters,” it could be liable for the taking of whales by private fishers with state-issued licenses.³³⁸

334. See *id.* § 6991c. The elements of an authorized state UST program are listed in § 6991c(a). If a state does not adopt its own UST program in accordance with federal requirements, the EPA will regulate USTs within the state directly under § 6991b. The notification requirement, however, is in § 6991a(c).

335. Indeed, there have been no challenges to these provisions in the years since Justice Stevens and some academic commentators commented upon the constitutional vulnerability of these provisions. See *Printz*, 521 U.S. at 955 (Stevens, J., dissenting); see also Adler, *supra* note 45, at 613–16; Johnson, *supra* note 328, at 55. The burden imposed by the background-check requirement at issue in *Printz* was also relatively minimal, but was nonetheless subject to numerous challenges prior to the *Printz* decision, perhaps because the underlying subject matter—gun control—is more controversial than certain forms of environmental regulation.

336. *Printz*, 521 U.S. at 935. But see *id.* at 936 (O'Connor, J., concurring) (“[T]he Court appropriately refrains from deciding whether other purely ministerial reporting requirements imposed by Congress on state and local authorities pursuant to its Commerce Clause powers are similarly invalid.”).

337. 939 F. Supp. 963, 992 (D. Mass. 1996).

338. *Id.* at 980.

On appeal, the U.S. Court of Appeals for the First Circuit upheld the injunction against a federalism challenge.³³⁹ Although this order could be viewed as requiring state regulatory officials to enforce a federal regulation—the prohibition on taking endangered species—the lower court's ruling did “not impose positive obligations on the [state] by converting its regulation of commercial fishing operations into a tool of the federal ESA regulatory scheme.”³⁴⁰ Rather, the court was merely preventing the state from allegedly taking endangered whales—albeit indirectly—by licensing fishing activities that entail an inevitable risk of such taking.

The First Circuit's ruling is only plausible insofar as a state can be held liable for taking an endangered species because it licenses (or refuses to prohibit) activity that could result in a take of endangered species—activity which is itself illegal under the ESA insofar as it results in the take of listed species.³⁴¹ In effect, *Strahan* holds that states have an obligation to administer state regulatory programs so as to implement the federal ESA, even though the activities to be regulated are themselves already illegal under federal law. This seems to contravene the holding of *New York* that “even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.”³⁴²

The First Circuit characterized the state's decision to issue licenses as a cause of illegal takes because the state licenses allowed the fishing to occur. Yet this presumes that absent a state-licensing scheme there would be no illegal takes from gillnet and lobster pot fishing. Precisely the opposite is the case. Were there no state licensing regime for gillnet and lobsterpot fishing, such activities could occur, at least within state waters. Therefore, the licensing of such activities should not be viewed as even a “but for” cause of the endangered species takes. Insofar as fishing activities threaten Northern Right whales, those activities are themselves illegal under the ESA and subject to federal enforcement. It is not clear upon what basis the legal obligation to enforce such a prohibition can be transposed onto a state merely because it elects to adopt a licensing scheme for state waters. If the state refrained from regulating gillnet and lobsterpot fishing altogether, the only way to mandate state enforcement of an anti-take prohibition would be to commandeer state officials.

The First Circuit rejected these federalism concerns on several grounds, none of which are particularly convincing. First, as noted above, the court maintained that the state itself violated the take prohibition by issuing licenses to activities that posed an inherent risk of taking endangered

339. *Strahan v. Cox*, 127 F.3d 155, 166, 171 (1st Cir. 1997).

340. *Id.* at 164.

341. See 16 U.S.C. § 1538(a) (2000).

342. *New York v. United States*, 505 U.S. 144, 166 (1992).

species. Second, the court suggested that the holding was justified by the Supremacy Clause and the undisputed federal power to preempt conflicting state laws.³⁴³ Yet in this case state law was not preempted—that is, federal law did not displace state law by imposing different standards upon the regulated entities. Rather it acted directly upon the state entity itself in its sovereign capacity as the regulator of state waters. The court correctly noted that Congress may offer states the choice of regulating a given activity in conformity with federal wishes or preempt state regulation with federal rules.³⁴⁴ Yet here the state was given no such choice. The district court injunction specifically required Massachusetts to bring its state regulations into conformity with federal law, and the federal take prohibition remains applicable to gillnet and lobsterpot fishers irrespective of what actions the state opts to take.

Acknowledging that *New York* and *Printz* prohibit the federal government from directing state officials to adopt a given regulatory regime, the court nonetheless concluded that ordering revisions in the state-licensing regime was permissible because the court did not “direct[] the state to enact a *particular* regulatory regime that enforces and furthers a federal policy.”³⁴⁵ Yet the fact that the state has an array of options to comply with the federal requirement does not lessen the constitutional problem if each option, standing alone, could not be imposed.³⁴⁶

Strahan violates the commandeering prohibition announced in *New York* and augmented in *Printz*. A federal requirement that a state must revise its method of regulating private activities seems to be precisely the sort of dictate that *New York* and *Printz* are meant to prohibit. Applying this principle in the ESA context would not result in significant changes in ESA enforcement. The take prohibition at issue in *Strahan* would continue to apply to private and state actors alike. The only limitation would be on using this prohibition as a justification for requiring states to alter or reform preexisting state regulatory regimes to make them more consonant with the ESA’s requirements.

2. Sovereign Immunity

The Supreme Court’s decisions upholding state sovereign immunity will have an identifiable impact on the scope of federal environmental regulation. Virtually every major environmental law contains citizen suit provisions authorizing private actors to seek enforcement of environmental

343. *Strahan*, 127 F.3d at 167, 170.

344. *Id.* at 170 (citing *New York*, 505 U.S. at 167).

345. *Id.* at 169. It is worth noting that the *Printz* decision, while addressed by the court, was decided after the briefing and oral argument in this case, but before the decision was issued. *Id.* at 169.

346. *New York*, 505 U.S. at 176.

regulations in federal court.³⁴⁷ Other statutes contain provisions authorizing the payment of damages for environmental harms or penalties for other offenses, such as violations of whistleblower protection laws. Insofar as the Court's sovereign immunity holdings prevent the initiation of suits against states for money damages, private citizens will be unable to invoke these provisions against state entities.

One immediate effect of the Court's sovereign immunity holdings is that state governments are no longer liable to private parties for response and cleanup costs under federal environmental statutes such as the Resource Conservation and Recovery Act³⁴⁸ or Superfund.³⁴⁹ This protection from liability does not extend to local governments, however, which may be more likely defendants in a Superfund contribution action because they own the majority of public waste disposal sites.³⁵⁰ Indeed, to date, suits against local governments under the Superfund statute have been "legion."³⁵¹

Where states implement environmental regulations in lieu of the federal government, sovereign immunity also bars private suits in federal court seeking to enforce the state regulatory provisions.³⁵² Under the Surface Mining Control and Reclamation Act ("SMCRA"),³⁵³ for example, states are given the choice of regulating in accordance with federal guidelines or accepting the imposition of federal regulations within the state. Once a state opts to regulate under SMCRA, and the state's regulatory scheme is approved by the federal government, the relevant federal regulations "drop out" as operative law in favor of the relevant state regulations, and private citizens may no longer sue states pursuant to SMCRA's citizen suit provisions in federal court.³⁵⁴ Even if a citizen plaintiff only seeks injunctive relief, sovereign immunity bars such a suit as "[a] State's sovereign dignity reserves to its own institutions the task of keeping its officers in line with that law."³⁵⁵ This restriction is potentially significant, though it will rarely arise.³⁵⁶

347. The one exception is the Federal Insecticide, Fungicide, and Rodenticide Act. 7 U.S.C. §§ 136-136y (2000).

348. See generally *Grine v. Coombs*, 189 F.3d 464 (3d Cir. 1999) (upholding dismissal on sovereign immunity grounds of a citizen suit seeking monetary damages from a state agency under the RCRA).

349. See generally *Burnette v. Carothers*, 192 F.3d 52 (2d Cir. 1999) (dismissing on sovereign immunity grounds a citizen suit seeking monetary damages from the state under the Superfund); see also *Percival*, *supra* note 4, at 844.

350. See *Percival*, *supra* note 4, at 844.

351. *McAllister & Glicksman*, *supra* note 173, at 10,676.

352. See *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 297-98 (4th Cir. 2001).

353. 30 U.S.C. §§ 1201-1211, 1231-1328 (2000).

354. *Bragg*, 248 F.3d at 295.

355. *Id.* at 297.

356. SMCRA, unlike many other cooperative federalism statutes, expressly provides for exclusive regulation by the state or federal government. See *id.* at 289; see also Mark Squillace,

Several major environmental statutes have "whistleblower" provisions that prevent an employer from firing or otherwise taking an adverse employment action against an employee for reporting or disclosing environmental violations.³⁵⁷ These provisions authorize an employee to file a complaint with the Secretary of Labor alleging retaliation for whistleblower activity and provide for various forms of relief, including reinstatement. Yet insofar as whistleblower actions against state agencies seek monetary compensation, such as back pay, they are precluded by sovereign immunity.³⁵⁸ Under *Federal Maritime Commission v. South Carolina Ports Authority*,³⁵⁹ it makes no difference that the initial complaint is addressed in a federal administrative proceeding prior to potential review by a federal court.³⁶⁰

Sovereign immunity does not bar whistleblower actions that seek purely prospective, injunctive relief from specific state officials instead of monetary compensation.³⁶¹ Nor does sovereign immunity prevent the federal government from initiating its own suit against state agencies for violating whistleblower protections, even if the suit is based upon a private complaint and seeks monetary relief for the sanctioned employee.³⁶² It is also possible that Congress could reenact the various whistleblower provisions pursuant to its authority under section 5 of the Fourteenth Amendment on the grounds that whistleblower protections are necessary to safeguard state employees' First Amendment rights against state action.³⁶³ Yet the existing whistleblower provisions cannot be defended on this ground as there is no language in the relevant statutes suggesting that this was Congress's intent, and such intent

Cooperative Federalism Under the Surface Mining Control and Reclamation Act: Is This Any Way to Run a Government?, 15 ENVTL. L. REP. 10,039, 10,039 (1985) (noting SMCRA's "unparalleled" delegation of regulatory authority to state governments).

357. E.g., Toxic Substances Control Act, 15 U.S.C. § 2622 (2000); Clean Water Act, 33 U.S.C. § 1367 (2000); Safe Drinking Water Act, 42 U.S.C. § 300j-9(i) (2000); Solid Waste Disposal Act, 42 U.S.C. § 6971 (2000); Clean Air Act, 42 U.S.C. § 7622 (2000); Superfund Act, 42 U.S.C. § 9610 (2000).

358. See generally *R.I. Dep't of Envtl. Mgmt. v. United States*, 304 F.3d 31 (1st Cir. 2002); *Conn. Dep't of Envt'l Prot. v. OSHA*, 138 F. Supp. 2d 285 (D. Conn. 2001); *Florida v. United States*, 133 F. Supp. 2d 1280 (N.D. Fla. 2001); *Ohio EPA v. United States Dep't of Labor*, 121 F. Supp. 2d 1155 (S.D. Ohio 2000).

359. 535 U.S. 743 (2002).

360. *R.I. Dep't of Envtl. Mgmt.*, 304 F.3d at 45 (noting that the *Federal Maritime Commission v. South Carolina State Ports Authority* decision "disposes of any argument . . . that, as a general proposition, a state's traditional immunity from suit does not extend to administrative proceedings initiated and prosecuted by private citizens).

361. See *Florida*, 133 F. Supp. 2d at 1291-92 (stating that administrative proceedings may continue insofar as it seeks prospective relief from state employees).

362. *R.I. Dep't of Envtl. Mgmt.*, 304 F.3d at 53; *Ohio EPA*, 121 F. Supp. 2d at 1167.

363. See *R.I. Dep't of Envtl. Mgmt.*, 304 F.3d at 51 (noting such a possibility).

to abrogate sovereign immunity will be found only if Congress "mak[es] its intention unmistakably clear in the language of the statute."³⁶⁴

While the above impacts may be significant, it is important not to overstate the effect of sovereign immunity on federal environmental law. As Professors McAllister and Glicksman note, predictions of "dire consequences" from these rulings "may be overstated and tend to ignore the many other facets of federal law that effectively permit redress against the states or ensure state compliance with federal law."³⁶⁵ As noted above, there are several alternative means of enforcing federal environmental requirements on state actors, ranging from *Ex parte Young* suits for injunctive relief against state actors to direct federal enforcement of federal rules.³⁶⁶ Where private plaintiffs seek injunctive or declaratory relief, such as a court order requiring a state official's compliance with an applicable federal environmental law, sovereign immunity is not an obstacle. Thus, *Seminole Tribe* noted that citizen suits against state officials seeking Clean Water Act enforcement are viable under *Ex parte Young*.³⁶⁷ Similarly, sovereign immunity does not prevent a citizen from suing state officials to stop alleged ongoing violations of the Endangered Species Act.³⁶⁸

IV. THE NEXT FEDERALISM BATTLEGROUND?

To date, the Supreme Court's federalism jurisprudence has had relatively little impact on federal environmental regulation, let alone a multiple "whammy."³⁶⁹ Even where federalism principles would counsel curtailling federal regulatory authority, as with the Commerce Clause,³⁷⁰ federal appellate courts have been reluctant to travel down this path, and

364. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000) (citation and quotation omitted); see also *R.I. Dep't of Envtl. Mgmt.*, 304 F.3d at 51 (quoting same); *Florida*, 133 F. Supp. 2d at 1291 (assuming, without deciding, that Congress could abrogate state sovereign immunity from whistleblower claims under section 5); *Ohio EPA*, 121 F. Supp. 2d at 1162 (same).

365. McAllister & Glicksman, *supra* note 173, at 10,669.

366. See *supra* Part II.B.2 (discussing state sovereign immunity).

367. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 75 (1996).

368. See, e.g., *Strahan v. Cox*, 127 F.3d 155, 166 (1st Cir. 1997) (noting sovereign immunity does not preclude "suits against state officials seeking declaratory and injunctive relief against the state officials in their individual capacities who act in violation of federal law"); see also *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 349 (4th Cir. 2001) (holding that sovereign immunity did not bar action against state officials seeking injunctive relief against enforcement of statutes limiting disposal of waste); cf. *Burnette v. Carothers*, 192 F.3d 52, 60 (2d Cir. 1999) (holding that environmental citizen suit provisions do not abrogate state sovereign immunity, and plaintiffs waived claim of *Ex parte Young* exception).

369. See *supra* note 2 and accompanying text.

370. See *supra* Part III.A (discussing the limitation of federal regulatory authority due to enumerated powers).

the Supreme Court, thus far, has rejected opportunities to lead the way.³⁷¹ Where the Court's federalism holdings do constrain existing environmental laws, by and large the limitations have been minor, and Congress is able to circumvent most such restrictions should it choose to do so.

That the revival of federalism has not yet transformed federal environmental policy does not ensure that it will not do so in the future. Looming on the legal horizon is at least one question of federalism that could cause substantial change in federal environmental law—constitutional limits on Congress's spending power, particularly Congress's authority to induce state action through the use of conditional spending.³⁷² Because conditional spending is used in many environmental laws to encourage, or otherwise induce, state cooperation with federal regulatory efforts, the scope of the spending power is important for federal environmental law. As the spending power is used to supplement, or extend, existing federal authority over state governments, legal challenges to such use of the spending power become more likely.

By limiting federal regulatory authority, the Court increased the pressure on Congress to use the spending power to achieve desired regulatory ends. The federal government can neither direct state legislatures nor commandeer state executive officials, but it can induce state cooperation with the promise of federal funds or the threat of direct federal action. Pressure and encouragement are constitutional; direct commands are not.³⁷³ The distinction between the two is not always clear, however. Even the use of conditional spending can, at some point, become "so coercive as to pass the point at which pressure turns into compulsion."³⁷⁴ Under existing precedent, it nonetheless appears Congress has ample authority to circumvent the Court's federalism holdings through the use of conditional spending.³⁷⁵ Indeed, some commentators have encouraged Congress to do just that.³⁷⁶

371. For instance, the Supreme Court has repeatedly denied certiorari in cases raising direct Commerce Clause challenges to environmental legislation. *See, e.g., Cargill, Inc. v. United States*, 516 U.S. 955 (1995) (denial of certiorari).

372. *See Chemerinsky, supra* note 3, at 105 ("The next frontier of [federalism] litigation is sure to be the Spending Clause.").

373. *See supra* Part II.B (discussing the impact of state sovereign immunity).

374. *South Dakota v. Dole*, 483 U.S. 203, 211 (1987).

375. Professors Baker & Berman note "easy to imagine" congressional responses to each of the Court's recent federalism decisions. Lynn A. Baker & Mitchell N. Berman, *Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 502-04 (2003); *see also* Choper & Yoo, *supra* note 3, 857 ("Given the broad sweep of the spending power as currently construed, the federal government would quite clearly have the ability to evade the direct limits on its Commerce Clause powers."); Engstrom, *supra* note 3, at 1199 ("[F]oreclosure of federal regulation of states through Congress's other enumerated powers has made the spending power a much more attractive source of federal authority."). Professor Zietlow goes further to suggest that the Court "virtually has invited Congress to use its Spending Power to circumvent Tenth Amendment limitations."

Insofar as Congress's spending power is not subject to constitutional constraints, it threatens to swallow the state sovereignty protected by the Court's sovereignty decisions and could be used to emasculate the limitations on federal power established by the enumerated powers decisions.³⁷⁷ Indeed, to Professor Baker, the spending power "is, and has long been" the "greatest threat to state autonomy" of all Congress's powers.³⁷⁸ Whereas states may have substantial incentive to resist commandeering or regulatory intrusions into areas of traditional state concern, states may be more accepting of federal requirements accompanied by federal funds.³⁷⁹

There is no particular reason to believe that coercive use of conditional spending is any less justiciable than other intrusions upon federalist norms. As the Court noted in *Lopez*, "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for [judges] to admit inability to intervene when one or the other level of Government has tipped the scales too far."³⁸⁰ Much as it reiterated the need for constitutional limits while upholding broad assertions of the commerce power, the Court's most recent statement on the scope of the spending power, *South Dakota v. Dole*,³⁸¹ upheld the use of conditional spending to induce state cooperation while reiterating that the spending power, however broad, has some limit.³⁸² If the Court revisits the scope of the Spending

Rebecca E. Zietlow, *Federalism's Paradox: The Spending Power and the Waiver of Sovereign Immunity*, 37 WAKE FOREST L. REV. 141, 190-91 (2002).

376. See, e.g., Mark Tushnet, *Alarmism vs. Moderation in Responding to the Rehnquist Court*, 78 IND. L.J. 47, 51-52 (2003). Other commentators suggest that such a strategy could backfire and encourage the Supreme Court to adopt a more restrictive conditional spending rule. See generally Baker & Berman, *supra* note 375.

377. Celestine Richards McConville, *Federal Funding Conditions: Bursting Through the Dole Loopholes*, 4 CHAP. L. REV. 163, 164-65 (2001) ("[T]he current broad scope of the spending power undermines the Court's recent federalism decisions because it permits an end-run around the federalism limits imposed on other enumerated powers."). See generally Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911 (1995).

378. Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 CHAP. L. REV. 195, 195 (2001). Insofar as the "cooperative federalism" model and the use of conditional spending foster greater federal-state interdependency, it undermines the principle of federal-state independence that was central to the underlying constitutional scheme. See generally Robert G. Natelson, *A Reminder: The Constitutional Values of Sympathy and Independence*, 91 KY. L.J. 353 (2003).

379. Ilya Somin, *Closing Pandora's Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 GEO. L.J. 461, 484 (2002) ("While state governments have strong political incentives to resist ordinary federal legislation that inhibits their authority, they have incentives to accept and even lobby for conditional federal grants.").

380. *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring).

381. 483 U.S. 203 (1987).

382. See Earl M. Maltz, *Sovereignty, Autonomy and Conditional Spending*, 4 CHAP. L. REV. 107, 108 (2001) ("[T]he Court clearly left open the possibility that it might look less favorably on other attempts to use the mechanism of conditional spending to induce state compliance with congressional wishes.").

Clause, and delineates the federalism limitations on Congress's conditional spending power, the impacts on environmental law could be substantial.

Much of federal environmental law is implemented and enforced by state governments in accordance with federal guidelines and restrictions. States are not commandeered to implement federal environmental regulatory programs. Rather, under the cooperative federalism model, Congress induces state cooperation by offering funding—and threatening preemption—of state environmental programs.³⁸³ In some cases, however, the spending power is not used so much to fund qualifying state environmental programs, as it is to threaten states with the loss of substantial federal assistance if states do not fall into line. Under the Clean Air Act, for example, states risk losing highway funds if they fail to adopt air pollution control plans that meet with Congress's and the Environmental Protection Agency's requirements. This is effective because highway moneys are an "irresistible lure to the states, even with substantial conditions attached."³⁸⁴

Yet as the federal government imposes increasingly stringent air pollution control requirements on states, it is increasingly likely that states will rebel. Two states challenged the use of conditional spending under the Clean Air Act in the 1990s.³⁸⁵ In 1997, the EPA tightened federal air quality standards, triggering an additional round of air pollution controls by state and local governments, including many areas that were not previously required to adopt federally mandated measures.³⁸⁶ The required controls will be even more expensive, and controversial, than existing air pollution control measures.³⁸⁷ According to EPA Administrator Michael Leavitt,

Indeed, one could conclude that a majority of the current justices have already indicated their willingness to enforce limitations on the spending power to prevent Congress from "obliterat[ing] distinctions between national and local spheres of interest and power by permitting the Federal Government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach." *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 654–55 (1999) (Kennedy, J., dissenting, joined by the Chief Justice and Justices Scalia and Thomas). Justice O'Connor, while not joining the passage above, clearly expressed her concerns about the use of conditional spending in her *Dole* dissent. *Dole*, 483 U.S. at 212–13 (O'Connor, J., dissenting).

383. See *infra* Part I.

384. Binder, *supra* note 54, at 160.

385. See *infra* Part IV.B (discussing Spending Clause challenges to the Clean Air Act).

386. Jennifer 8. Lee, *Clear Skies No More for Millions as Pollution Rule Expands*, N.Y. TIMES, Apr. 13, 2004, at A22 (noting that "more than double" the number of counties fail to meet the revised National Ambient Air Quality Standards for ozone than failed to meet the previous standard).

387. Several states resisted the imposition of some requirements for state implementation plans under the Clean Air Act in the 1990s, even though they had relatively little legal recourse. See, e.g., Lynn Scarlett, *Smogged Down—California Residents' Complaints Against the State's Smog Check Procedures*, REASON, Dec. 1996 (detailing California's objections to vehicle emission inspection and maintenance requirements), available at <http://reason.com/9612/col.lynn.shum1>; EPA's *Big Road Test*, WALL ST. J., Apr. 6, 1995, at A16 (noting some Clean Air Act

"There are counties that could take all their cars off the roads, close their factories and clean up their power plants and still not be in attainment."³⁸⁸ For this reason, litigation challenging the loss of highway funds would seem likely.

The Clean Air Act sanction regime could be vulnerable even under existing spending power doctrine. Should the Court tighten enforcement of constitutional limits on conditional spending, perhaps along the lines suggested by some commentators, the impact on environmental law could be quite far-reaching.³⁸⁹ A more rigorous conditional spending doctrine could both restrict existing environmental laws and limit Congress's ability to get around other federalism limitations on federal regulatory authority.

A. THE SPENDING POWER

Article I, section 8 of the Constitution empowers Congress to "lay and collect Taxes, Duties, Imposts, and Excises to pay the Debts and provide for the common Defence and general Welfare of the United States."³⁹⁰ At the time of the founding, there was substantial debate as to the breadth of the power authorized by this clause. As with other enumerated powers, leading founders disagreed as to its precise scope. James Madison, for example, argued that the clause only empowered Congress "to pursue those ends specifically identified in Article I. To Madison, the phrase "general welfare" did not license Congress to pursue any end it thought in the public interest.³⁹¹ The alternative interpretation would grant Congress a "general power of legislation, instead of the defined and limited" one hitherto understood to belong to them."³⁹² Alexander Hamilton, on the other hand, contended that there were few, if any, substantive limitations on the spending power.³⁹³ The power to raise money was "*plenary, and indefinite*" and the range of purposes for which money could be spent "no less comprehensive," so long as appropriations were "[g]eneral and not *local*."³⁹⁴ In Hamilton's view, the clause conferred an independent and distinct power

requirements created a "flashpoint" between the EPA and some states); *Texas Joins States Fighting CAA, EPA Emission Testing Mandates*, AIR WATER POLLUTION REP., Mar. 6, 1995.

388. Lee, *supra* note 386.

389. See *infra* notes 455–68 and accompanying text.

390. U.S. CONST. art. I, § 8.

391. John C. Eastman, *Restoring the "General" to the General Welfare Clause*, 4 CHAP. L. REV. 63, 67 (2001).

392. 30 ANNALS OF CONG. 212 (1817).

393. See ALEXANDER HAMILTON, REPORT ON MANUFACTURES (1791), reprinted in 2 THE FOUNDERS' CONSTITUTION 446–47 (Philip B. Kurland & Ralph Lerner eds., 1987). Hamilton acknowledged that the Constitution required that duties be uniform and direct taxes apportioned by population. *Id.* at 446–47; see U.S. CONST. art. I, § 2, amended by U.S. CONST. amend. XIV, § 2.

394. Hamilton, *supra* note 393, at 446.

not limited by the other affirmative grants of power enumerated in Article I, section 8.³⁹⁵

There are reasons to suspect Madison's interpretation of the spending power was more representative of the original understanding of the clause.³⁹⁶ Among other things, federal grants to the states are a modern development. There were few such programs prior to the Progressive Era and the New Deal.³⁹⁷ Nonetheless, the Hamiltonian view is dominant today.³⁹⁸ Since *United States v. Butler*³⁹⁹ in 1936, the Supreme Court has explicitly embraced a Hamiltonian interpretation of the spending power as "the correct one."⁴⁰⁰ According to the *Butler* Court, "[T]he power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution."⁴⁰¹ Similarly, in *Helvering v. Davis*,⁴⁰² the Court held that Congress has broad discretion to determine whether a given incident of taxation or spending is within the "general welfare."⁴⁰³ Madison's definition, on the other hand, was rejected in *Butler* as a "mere tautology."⁴⁰⁴

The spending power is not merely the power to appropriate federal money for federal purposes. As interpreted by the courts, it is also the power to induce private or state action by attaching conditions to the expenditure of federal money. As the Court noted in *Fullilove v. Klutznick*,⁴⁰⁵ the clause empowers Congress to impose conditions on the use of federal funds "to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives."⁴⁰⁶ In *Butler*, the Court struck down portions of the Agricultural Adjustment Act that imposed a tax on processors of agricultural commodities in order to subsidize reductions in farm production. The Court invalidated this use of the spending power because it sought "to regulate

395. See *United States v. Butler*, 297 U.S. 1, 65 (1936) (noting "Hamilton . . . maintained that the clause confers a power separate and distinct from those later enumerated, [and] is not restricted in meaning by the grant of them").

396. See Eastman, *supra* note 391, at 64–87. See generally Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1 (2003).

397. Somin, *supra* note 379, at 492.

398. See David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 5 (1994) ("No one today candidly denies that Hamilton's view of the spending power was correct.").

399. 297 U.S. 1 (1936).

400. *Id.* at 66. The Court also rejected the view that the Spending Clause grants an independent power to pursue the "general welfare" apart from taxing and spending. *Id.* at 65–66.

401. *Id.* at 66.

402. 301 U.S. 619 (1937).

403. *Id.* at 640–41.

404. *Butler*, 297 U.S. at 65.

405. 448 U.S. 448 (1980).

406. *Id.* at 474.

and control agricultural production, a matter beyond the powers delegated to the federal government."⁴⁰⁷ The spending power, while broad and far-reaching, could not be used to *regulate* matters beyond Congress's *regulatory* authority. Assuming this part of *Butler*'s holding remains good law, it does not substantially limit congressional authority insofar as the scope of Congress's regulatory powers under the Commerce Clause has expanded dramatically since the 1930s, *Lopez* and *Morrison* notwithstanding.⁴⁰⁸ At the very least, Congress may use the spending power to regulate or influence any activity that is within the scope of Congress's other enumerated powers.

The spending power is unquestionably broad, but it is not unlimited. In 1987, in *South Dakota v. Dole*,⁴⁰⁹ the Supreme Court identified five restraints upon Congress's use of conditional federal spending. First, the appropriation of funds must be for the "general welfare" and not for a narrow special interest.⁴¹⁰ In making this determination, however, courts are "to defer substantially to the judgment of Congress."⁴¹¹ Second, there can be no independent constitutional bar to the condition imposed upon the federal spending.⁴¹² In other words, Congress may not seek to use the spending power to induce states to engage in conduct that would otherwise be unconstitutional. Third, any conditions imposed upon the receipt of federal funds must be clear and unambiguous.⁴¹³ Recipients of federal funds must have notice of any conditions with which they must comply and the scope of their obligation.⁴¹⁴ As the Court noted in *Pennhurst*, "[T]he legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'"⁴¹⁵ Fourth, and most significant, the conditions themselves must be related to the federal interest that the exercise of the spending power is itself supposed to advance. In the Court's words, "[T]he condition imposed by Congress is directly related to one of the main purposes for which . . . funds are expended."⁴¹⁶ As reaffirmed in *New York*, the "conditions must . . .

407. *Butler*, 297 U.S. at 68.

408. See *South Dakota v. Dole*, 483 U.S. 203, 216 (1987) (O'Connor, J., dissenting) ("The error in *Butler* was not the Court's conclusion that the Act was essentially regulatory, but rather its crabbed view of the extent of Congress' regulatory power under the Commerce Clause.").

409. 483 U.S. 203 (1987).

410. *Id.* at 207.

411. *Id.*

412. *Id.*

413. *Id.*

414. Engdahl, *supra* note 398, at 78 (noting that "sufficient clarity is required not only as to the fact that an obligation is being assumed, but also as to the scope or scale of that obligation").

415. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). The interpretive rule urged in *Pennhurst* is arguably in tension with *Chevron* deference for agency interpretations of ambiguous statutory language. See Engstrom, *supra* note 3, at 1209-16.

416. *Dole*, 483 U.S. at 208.

bear some relationship to the purpose of the federal spending, . . . otherwise, of course, the spending power could render academic the Constitution's other grants and limits of federal authority."⁴¹⁷

Dole also suggested a fifth limitation on the use of conditional spending—"coercion." Specifically, the Court noted that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"⁴¹⁸ This point has been reiterated in subsequent cases.⁴¹⁹ While not explaining what amount or degree of financial inducement would be necessary for an exercise of the spending power to become coercive, the *Dole* majority noted that here Congress only conditioned "a relatively small percentage of certain federal highway funds"⁴²⁰—specifically five percent of the funds from specific highway grant programs. Such an imposition represents "relatively mild encouragement to the States," thereby leaving states with the ultimate decision as to whether to conform to federal dictates and is therefore not coercive.⁴²¹ Alternatively, the coercion inquiry could turn not on the amount of money at stake, but on whether the manner in which the conditions were imposed "interferes with a state's sovereign accountability."⁴²²

The Court has long recognized that "the Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof."⁴²³ The problem occurs when Congress adopts "unreasonable" conditions. One could imagine a situation in which every payment from the federal government to states is conditioned upon acquiescence to every jot and tittle of every mandate contained in every federal statute. Well before the Supreme Court's reinvigoration of federalism principles, Professor Richard Stewart warned that "such a broad reading of congressional power would afford Congress a way to exercise the spending power where it is not spending, by drafting grant conditions that reach areas in which the state has accepted no

417. *New York v. United States*, 505 U.S. 144, 167 (1992) (citations omitted).

418. *Dole*, 483 U.S. at 211 (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)).

419. See, e.g., *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 687 (1999) (noting that, in some instances, "the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion" (quoting *Dole*, 483 U.S. at 211)); see also *New York*, 505 U.S. at 167 (noting the limits of federal spending power).

420. *Dole*, 483 U.S. at 211.

421. *Id.*

422. *McConville*, *supra* note 377, at 173 ("Coercion implicates a state's ability to act as a representative of its people, not the state's level of temptation in choosing among alternatives.").

423. *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295 (1958). As the Court has noted more recently, "Congress has no obligation to use its Spending Clause power to disburse funds to the States; such funds are gifts." *Coll. Sav. Bank*, 527 U.S. at 686-87.

funds.”⁴²⁴ If Congress is not limited in this manner, “the spending power could render academic the Constitution’s other grants and limits of federal authority.”⁴²⁵ At such an extreme, the spending power would eliminate the judicial safeguards of federalism embodied in the Court’s federalism jurisprudence.

Although the *Dole* Court clearly stated that Congress’s power to impose conditions on the receipt of federal funds is limited, federal appellate courts have been extremely reluctant to strike down federal programs for exceeding the scope of the spending power.⁴²⁶ The “general welfare” prong is treated as a “complete throw away,”⁴²⁷ and most of the other prongs have not fared much better.⁴²⁸ Perhaps the relatedness prong of the *Dole* test has the greatest potential for constraining the use of conditional spending. It is repeatedly referenced by the lower courts, but rarely examined in any detail.⁴²⁹ The concept of “coercive” uses of federal spending has attracted some attention as well, but “the coercion theory is somewhat amorphous and cannot easily be reduced to a neat set of black-letter rules of application.”⁴³⁰

The doctrinal limits on the spending power are admittedly unclear. Yet in their rush to dismiss Spending Clause claims, some federal courts have almost certainly gone too far. In *Nevada v. Skinner*,⁴³¹ for example, the Ninth Circuit held that Congress could make ninety-five percent of a state’s highway funds conditional upon that state’s setting of a fifty-five miles-per-hour highway speed limit. According to Judge Reinhardt’s opinion for the panel, the conditional grant of funds did not amount to “coercion” that would “leave the state with no practical alternative but to comply with federal restrictions.”⁴³² Key to the holding was the court’s determination that “Congress has the authority” under the Commerce Clause “to compel the

424. Stewart, *supra* note 46, at 1261.

425. New York v. United States, 505 U.S. 144, 167 (1992).

426. See Kansas v. United States, 214 F.3d 1196, 1201–02 (10th Cir. 2000) (“The Court has never employed the [coercion] theory to invalidate a funding condition, and federal courts have been similarly reluctant to use it.”); Nevada v. Skinner, 884 F.2d 445, 448 (9th Cir. 1989) (“The coercion theory has been much discussed but infrequently applied in federal case law, and never in favor of the challenging party.”).

427. Baker & Berman, *supra* note 375, at 464.

428. *Id.* (“[T]he lower courts, quite predictably, have found little use for three of the five elements of the test.”); *id.* at 466 (noting that the other two elements have not fared much better, as most lower courts have read them “to be toothless, even nonjusticiable, en route to sustaining a wide range of conditional federal spending legislation”).

429. *Id.* at 466–67. But see Barbour v. Wash. Metro. Area Trans. Auth., 374 F.3d 1161, 1168–69 (D.C. Cir. 2004) (discussing the relatedness prong); *infra* notes 446–54 and accompanying text (same).

430. West Virginia v. United States Dep’t of Health & Human Servs., 289 F.3d 281, 288 (4th Cir. 2002).

431. 884 F.2d 445 (9th Cir. 1989).

432. *Id.* at 448.

States through direct regulation to change its practices."⁴³³ As *Skinner* was decided in 1989, years prior to *New York* and *Printz*, this may have been a reasonable conclusion for the court to draw at the time.⁴³⁴ In the wake of the anti-commandeering decisions, however, this rationale is unsustainable.

There is little doubt that Congress could directly impose a fifty-five mile-per-hour speed limit on federal highways under the Commerce Clause. Such a law would require federal enforcement, however. This makes such a law unlikely, as Congress would only enact such a law if it concluded that the benefits of a uniform federal speed limit were greater than the costs of creating a federal highway patrol or otherwise diverting federal law enforcement resources to policing the nation's highways. The *Skinner* court, however, found that Congress could *compel* the states to impose a federal speed limit to be enforced by *state* officials.⁴³⁵ Unlike a true federal speed limit, such a law would lie beyond the scope of federal power. Under *New York* and *Printz*, Congress has power neither to compel a state legislature to adopt such a rule nor to commandeer state law enforcement officials to implement the federal rule. Insofar as *Skinner* stands for the proposition that there is no coercion if Congress is using conditional spending to encourage the adoption and enforcement of state laws that Congress could impose on the states directly, it can no longer be good law after *New York* and *Printz*.

Not every federal appellate court has dismissed arguments for limiting the scope of Congress's spending power. In 1997, an *en banc* panel of the U.S. Court of Appeals for the Fourth Circuit held, in *Virginia Department of Education v. Riley*, that the Department of Education could not condition state receipt of federal funds under the Individuals with Disabilities Education Act ("IDEA") on compliance with terms not explicit in the statute itself.⁴³⁶ The Department of Education had sought to withhold all of Virginia's IDEA grants for two fiscal years—some \$60 million—because Virginia did not provide free education to disabled students who were expelled or suspended for behavior unrelated to their disabilities.⁴³⁷ According to the Department, this policy contravened the statutory requirement that state recipients of IDEA funds must, among other things, "assure[] all children with disabilities the right to a free appropriate public education."⁴³⁸

The *en banc* Fourth Circuit rejected, by a vote of 11–2, the Department's position on the ground that the language of the IDEA did not clearly

433. *Id.* at 449.

434. *But see* note 296 and cases cited therein.

435. *Skinner*, 884 F.2d at 449 (stating that "if Congress has the authority under the Commerce Clause to order a state *directly* to comply with a particular standard such as a 55-mile-per-hour speed law," Congress may condition the receipt of federal funds on such a condition).

436. 106 F.3d 559, 579 (4th Cir. 1997) (*en banc*).

437. *Id.* at 560.

438. 20 U.S.C. § 1412(1) (2000).

manifest Congress's intention to prohibit a state recipient from adopting the policy at issue. According to the court's majority,⁴³⁹ "Language which, at best, only implicitly conditions the receipt of federal funding on the fulfillment of certain conditions is insufficient to impose on the state the condition sought."⁴⁴⁰ Since, "at most," the IDEA "only implicitly conditions the States' receipt of funds upon the continued provision of educational services to students expelled for misconduct unrelated to their handicaps," the condition could not be imposed on an unconsenting state.⁴⁴¹ Particularly in an area of traditional state concern, such as education, courts must insist on "a clear, unambiguous statutory expression of congressional intent to condition the States' receipt of federal funds in a particular manner."⁴⁴²

While the *en banc* court rested its decision on Congress's failure to impose an unambiguous condition on the receipt of IDEA money, six judges went further, noting a "substantial . . . question" whether the Department's policy would have constituted unconstitutional "coercion" under *Dole* even if explicitly authorized by Congress.⁴⁴³ For the federal government to withhold \$60 million in IDEA funds because of Virginia's failure to provide a free education to 126 of the 128,000 handicapped students for whose benefit Virginia was to receive IDEA funds would be "considerably more pernicious than the 'relatively mild encouragement' at issue in *Dole*."⁴⁴⁴ Whereas in *Dole* states only risked losing a small portion of federal funding for failing to adopt a higher drinking age, in *Riley* the Department sought to withhold "the entirety of a substantial federal grant" because Virginia refused "to fulfill their federal obligation in some insubstantial respect rather than submit to the policy dictates of Washington in a matter peculiarly within their powers as sovereign states."⁴⁴⁵ Six judges suggested that if anything could be considered unduly coercive under *Dole*, the Department's policy at issue in *Riley* would be it. To date, however, no federal appellate court has so held.

439. It is worth noting that while eleven judges concurred in the judgment, only nine explicitly adopted the rationale articulated by Judge Luttig. As one commentator noted, "*Riley* was a messy affair." Engstrom, *supra* note 3, at 1213.

440. *Riley*, 106 F.3d at 561 (per curiam).

441. *Id.* at 563 (opinion of Luttig, J.).

442. *Id.* at 566 (opinion of Luttig, J.). Like the Supreme Court in *Solid Waste Agency*, the *Riley* majority explicitly rejected the government's contention that the Department's position was due *Chevron* deference. *Id.* at 567 ("It is axiomatic that statutory ambiguity defeats altogether a claim by the Federal Government that Congress has unambiguously conditioned the States' receipt of federal monies in the manner asserted."); see also *supra* note 267. For a broader discussion of the *Riley* court's rejection of *Chevron* deference in the spending clause context, see Engstrom, *supra* note 3, at 1212-16.

443. *Riley*, 106 F.3d at 561.

444. *Id.* at 569 (opinion of Luttig, J.).

445. *Id.* at 570 (opinion of Luttig, J.).

The scope of the relatedness inquiry has also recently divided a federal appellate court. In *Barbour v. Washington Metropolitan Area Transit Authority*,⁴⁴⁶ a divided panel of the D.C. Circuit found that Congress could condition a state transit agency's receipt of federal funds on the waiver of sovereign immunity under the Rehabilitation Act, a federal statute that prohibits disability discrimination. The panel majority joined several other circuits⁴⁴⁷ in finding that Congress could impose such a condition to ensure that federal funds were not "used to facilitate disability discrimination" and to ensure "that federal money is used for the provision of public transportation, and nothing else."⁴⁴⁸ Just as Congress has authority, pursuant to the Necessary and Proper Clause, "to see to it that taxpayer dollars appropriated under [the spending] power are in fact spent for the general welfare and not frittered away in graft," as the Supreme Court recently held in *United States v. Sabri*,⁴⁴⁹ the majority in *Barbour* reasoned that Congress could ensure that federal monies do not subsidize disability discrimination.⁴⁵⁰

Judge Sentelle, in his dissent, denied that the conditions at issue in *Barbour* complied with *Dole*.⁴⁵¹ While preventing discrimination may be a valid federal interest, it is not the purpose of federal support for state transit agencies.⁴⁵² Congress can impose conditions to prevent the likelihood of corruption because such corruption could prevent the expenditure of federal funds for the congressionally determined purpose. Money "frittered away in graft" is not available to fund mass transit. Yet whether or not transit agencies discriminate against the disabled has no bearing on the availability of funds for mass transit services.⁴⁵³ According to the dissent, "the proper test under *Dole* and *New York* is whether the condition is germane to the interest in the 'particular national project[] or program[],' not whether Congress has a generalized 'interest' in imposing the condition."⁴⁵⁴ This division in the D.C. Circuit highlights the tension between the Supreme

446. 374 F.3d 1161 (D.C. Cir. 2004).

447. See *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 128 (1st Cir. 2003); *A.W. v. Jersey City Pub. Sch.*, 341 F.3d 234, 239 (3d Cir. 2003); *Lovell v. Chandler*, 303 F.3d 1039, 1051 (9th Cir. 2002).

448. *Barbour*, 374 F.3d at 1168.

449. 124 S.Ct. 1941, 1946 (2004).

450. *Barbour*, 374 F.3d at 1169-70.

451. The dissent also rejected the argument that Congress could impose such conditions under section 5 of the 14th Amendment. *Id.* at 1170-77 (Sentelle, J., dissenting).

452. *Id.* at 1172 ("The purpose of the federal funds WMATA receives is to subsidize the mass-transit services WMATA provides. They are transportation funds.").

453. *Id.* (rejecting the argument that "the legislature can identify something a state does that it does not like—in the case, discriminate on the basis of disability—and condition any grant of funds on a state's not doing that act any more, assuming the condition is otherwise constitutionally valid").

454. *Id.* at 1173 (quoting *South Dakota v. Dole*, 483 U.S. 203, 207 (1987)).

Court's federalism holdings and an unconstrained power to impose conditions on federal grants. It additionally illustrates that a broad spending power could nonetheless be subject to significant, judicially enforceable limits.

Commentators have noted several ways in which the Supreme Court could police the limits of the spending power. For starters, the Court could simply apply the existing elements of the *Dole* test with more rigor.⁴⁵⁵ For instance, the relatedness prong could be read to require that the federal spending and the imposed condition both directly advance the same interest.⁴⁵⁶ The conditional spending in *Dole* might pass this test depending on how directly the interest must be advanced. One could argue that federal highway funding and a reduced drinking age both improve highway safety.⁴⁵⁷ Other conditions, however, such as that a state adopt regulations for coal-fired power plants as a condition of receiving federal highway money, would not. The Court could also define precisely what it means for the federal government to "coerce" state action through conditional spending.⁴⁵⁸ Through either approach, the Court "could maintain at least nominal fidelity to the *Dole* test," even as it applied the test in a manner suggesting the precise outcome in *Dole* was incorrect.⁴⁵⁹

Professor Baker proposes that those conditions on the receipt of federal funds that seek to regulate the states in a manner in which the federal government could not directly regulate state activity should be presumed invalid.⁴⁶⁰ The federal government could overcome this presumption only by demonstrating that the funding constitutes "reimbursement spending," as opposed to "regulatory spending."⁴⁶¹ Under Professor Baker's formulation, the federal government may specify how a given state is to spend federal grants and may condition receipt of the federal money on meeting such conditions, so long as the money to which the conditions are attached is only that money which is to be used to implement the program in question.⁴⁶² Such "reimbursement spending" is permissible under Professor Baker's test. Spending conditions which otherwise seek to regulate the states

455. Baker & Berman, *supra* note 375, at 512.

456. *Id.* at 517.

457. *But see id.* at 516 (noting that such a test "dictates a different result on the very facts of *Dole*").

458. *Id.* at 520-21.

459. *Id.* at 521.

460. *See generally* Lynn A. Baker, *Conditional Federal Spending after Lopez*, 95 COLUM. L. REV. 1911 (1985).

461. *Id.* at 1962-63.

462. *Id.*

in a manner otherwise beyond the scope of Congress's powers would be impermissible.⁴⁶³

Professor Berman proposes an alternative test, focusing on the "coercion" element of the *Dole* test. Specifically, Professor Berman proposes that a conditional offer of federal funds should be deemed unconstitutional if withholding some or all of the federal funds at issue would be unconstitutional.⁴⁶⁴ Whereas Congress may opt, in isolation, to provide states with federal funds or not, Professor Berman suggests that Congress cannot withhold money from the states for an impermissible or "improper" reason if doing so would effectively penalize a state for failing to concede its sovereign authority to set a given policy.⁴⁶⁵ Where the withholding of federal funds can be justified on the grounds that it serves a legitimate federal purpose, perhaps that withholding the funds *in itself* will advance the purpose of the federal program, the state is not being penalized, and the condition may be imposed.⁴⁶⁶ In effect, Berman hinges the coercion inquiry on the congressional purpose behind withholding the federal funds and not on the magnitude of the funds at issue or the "pressure" that the funding condition appears to impose on the states.

Either of the tests put forward by Professors Baker and Berman would be more restrictive than the *Dole* test, particularly as it is currently applied in the lower courts. So, too, would proposals to reinvigorate the "general welfare" requirement so as to limit the sorts of projects for which Congress could appropriate funds,⁴⁶⁷ or to otherwise limit federal grants to states across the board.⁴⁶⁸ If the Court is less aggressive in its initial efforts to reign in the spending power, as seems most likely, it would simply tighten the test articulated in *Dole*, much as in *Lopez* it tightened the limitations on the commerce power within the framework laid out in prior cases. While simultaneously upholding ever-broader assertions of federal authority under the Commerce Clause, the Court nonetheless reiterated that the power was limited, providing the doctrinal hook for the Court to use in *Lopez*.⁴⁶⁹ The limiting language in *Dole* could well be used to the same effect, and this may

463. *But see* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 687 (1999) ("Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take . . .").

464. *See generally* Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1 (2001).

465. *Id.* at 37.

466. *Id.*

467. *See* John C. Eastman, *Restoring the "General" to the General Welfare Clause*, 4 CHAP. L. REV. 63, 64-65 (2001).

468. *See generally* Somin, *supra* note 379.

469. *See, e.g.,* NLRB v. Jones & Laughlin Steel, 301 U.S. 1, 30 (1937) ("That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system.").

well yet occur as the Court's federalism cases would suggest that some tightening of the Congress's conditional spending power is in order.

Left unrestrained, Congress may use the conditional grant of federal funds to achieve those ends that would otherwise be barred by the holdings of *New York*, *Lopez*, and *Printz*. States receive federal grants for welfare, environmental programs, highways, police, and many other purposes, and are therefore quite reliant upon the national fisc. A federal recommendation that states implement a desired program or risk losing federal support could be quite coercive. Thus, the ultimate import of the Court's recent federalism cases may depend upon whether it opts to limit Congress's ability to use conditional spending to bribe and compel state actions.

B. CONDITIONAL SPENDING IN ENVIRONMENTAL LAW

Among all federal environmental statutes, the Clean Air Act ("CAA") is the source of the greatest state-federal conflict.⁴⁷⁰ It also represents Congress's most aggressive effort to induce state regulation through the use of conditional spending and is therefore the most vulnerable to spending power challenge. Whereas many federal environmental statutes attach conditions on the use of federal funding of state environmental programs, the CAA relies upon the threat of withholding federal highway funds to ensure state cooperation.

Under the CAA, the Environmental Protection Agency ("EPA") sets National Ambient Air Quality Standards ("NAAQS") for criteria air pollutants, such as ozone ("smog") and particulate matter ("soot"). States with metropolitan areas that fail to attain NAAQS are required to draft State Implementation Plans ("SIPs"), which they submit to the EPA for its approval. Among other things, an adequate SIP must include "enforceable emission limitations . . . as well as schedules and timetables for compliance,"⁴⁷¹ monitoring systems,⁴⁷² a fee-based permitting system for stationary sources,⁴⁷³ an enforcement program,⁴⁷⁴ and provide for sufficient public participation in the SIP process.⁴⁷⁵ The 1990 Clean Air Act amendments added additional requirements for state-permitting programs for stationary sources.⁴⁷⁶ The SIP process is the "heart" of the CAA.⁴⁷⁷

470. See generally Dwyer, *supra* note 36.

471. 42 U.S.C. § 7410 (a)(2)(A) (2000).

472. *Id.* § 7410 (a)(2)(B).

473. *Id.* § 7410 (a)(2)(L).

474. *Id.* § 7410 (a)(2)(C)(a)(2), (E).

475. States must provide "reasonable notice" and public hearings on SIPs and consult with affected local entities. *Id.* § 7410 (a)(2), (a)(2)(M).

476. 42 U.S.C. § 7651o.

477. *Union Elec. Co. v. EPA*, 427 U.S. 246, 249 (1976).

Failure to submit a fully adequate SIP by the appropriate deadlines results in the imposition of one or more federal sanctions, including the loss of federal highway funds, increased offset requirements for new development, and the imposition of a Federal Implementation Plan ("FIP") that the EPA will enforce.⁴⁷⁸ The imposition of such sanctions is not solely, or even primarily, within the EPA's discretion, as individual citizens and activist groups may force the EPA's hands through citizen suits seeking to enforce the express requirements of the CAA and regulations promulgated pursuant to it.⁴⁷⁹ Thus, short of legislation, states have little political ability to seek compromise over the CAA's enforcement.⁴⁸⁰ Moreover, local transportation projects cannot receive federal funding unless they conform to an EPA-approved SIP.⁴⁸¹

In 1995, two states, Missouri and Virginia, challenged the imposition of sanctions under the CAA.⁴⁸² Each alleged that the EPA's decision, if not the statutory provisions authorizing sanctions themselves, were unconstitutional infringements upon state sovereignty. According to the states, the CAA impermissibly authorized the EPA to impose severe sanctions upon those states failing to comply with the EPA's interpretation of the Act.⁴⁸³ Both claimed that the highway fund sanction was an unconstitutional use of the federal spending power. Neither state was successful.

According to the Fourth Circuit, the CAA's provisions passed constitutional muster "because although its sanctions provisions potentially burden the states, those sanctions amount to inducement rather than 'outright coercion.'"⁴⁸⁴ The district court in Missouri reached a similar conclusion, relying upon dicta in *New York* that "conditions [on receipt of federal funds] must . . . bear *some* relationship to the purpose of federal spending."⁴⁸⁵ For the Missouri court, "the appropriate focus is not on the alleged impact of a statute on a particular state program but whether Congress has 'directly compel[led]' the state 'to enact a federal regulatory program.'"⁴⁸⁶ While the Missouri court only addressed the question of

478. 42 U.S.C. § 7509.

479. *Id.* § 7604.

480. See Michael S. Greve, *Friends of the Earth, Foes of Federalism*, 12 DUKE ENVTL. L. & POL'Y F. 167, 176 (2001).

481. 42 U.S.C. § 7506.

482. *Virginia v. Browner*, 80 F.3d 869, 873 (4th Cir. 1996); *Missouri v. United States*, 918 F. Supp. 1320, 1323-25 (E.D. Mo. 1996), *vacated*, 109 F.3d 440 (8th Cir. 1997).

483. Virginia also argued that the EPA was wrong to conclude that its stationary source permit program failed to comply with Title V of the Clean Air Act. *Browner*, 80 F.3d at 872.

484. *Id.* at 881.

485. *Missouri*, 918 F. Supp. at 1333 (citing *New York v. United States*, 505 U.S. 144, 167 (1992)) (emphasis in *Missouri* opinion).

486. *Id.* at 1328 (quoting *New York*, 505 U.S. at 161).

whether such sanctions were unconstitutional on their face, it implied that an as-applied challenge would not fare any better.⁴⁸⁷

Both courts based their decisions on *Dole*.⁴⁸⁸ This reliance may be misplaced, however. It is not clear that threatening federal highway moneys falls squarely within *Dole's* holding.⁴⁸⁹ Highway funds are raised from a dedicated revenue source in gasoline taxes and placed in the Highway Trust Fund.⁴⁹⁰ For many states, federal highway funds represent the lion's share of their transportation budget.⁴⁹¹ These moneys are explicitly earmarked for transportation projects.⁴⁹² Conditioning the receipt of such funds on compliance with myriad federal environmental requirements seems to strain the *Dole* test, particularly when viewed against the background of the Court's broader federalism jurisprudence.

Federal highway legislation suggests many reasons why federal funding of highway construction supports the "general welfare," but environmental protection is not one of them. On the other hand, both the highway legislation and the drinking age increase at issue in *Dole* were explicitly enacted to improve highway safety.⁴⁹³ The connection between the CAA's purpose and transportation is also ambiguous, as states can lose their highway funding for failing to meet *any* of the CAA's myriad SIP requirements.⁴⁹⁴ Nothing in the CAA requires any connection to highways, mobile sources, or even the specific pollutants most associated with vehicular traffic. Failure to adopt a sufficiently rigorous stationary source permit scheme, sufficiently stringent emission regulations on dry cleaners, bakeries and other "area" sources, or even failure to provide adequate

487. *Id.* at 1329. Missouri had sought to challenge the provisions on both grounds, but the District Court determined that an as-applied claim was not yet ripe. *Id.*

488. *Browner*, 80 F.3d at 881-82; *Missouri*, 918 F. Supp. at 1330, 1332-34.

489. However, it is certain that they would fall outside the test articulated by Justice O'Connor in her dissent. *South Dakota v. Dole*, 483 U.S. 203, 216 (1987) (O'Connor, J., dissenting).

490. For a brief overview of the history and financing of the Highway Trust Fund, see Salvatore Massa, *Surface Freight Transportation: Accounting for Subsidies in a "Free Market"*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 285, 318-19 (2000-2001).

491. *Binder*, *supra* note 54, at 160 (noting that federal funding can account for ninety-five percent of a state's transportation budget).

492. Massa, *supra* note 490, at 318. Some argue that the "trust fund" system within the federal budget is simply an accounting gimmick and that there is not, in fact, a separate "fund" of highway monies. See, e.g., Thomas G. Donlan, *Selling America Short*, BARRON'S, Aug. 10, 1998, at 34 (suggesting federal "trust funds" are "budgetary gimmicks"). Whether this is true when the issue is deficit reduction, a strong argument can be made that the federal government has a moral, if not legal, obligation to expend money from the trust fund for road purposes and nothing else, as this is the express basis upon which the relevant monies are raised.

493. See *Dole*, 483 U.S. at 208-09. Whether improving highway safety by, respectively, improving road construction or reducing drunk driving was the actual motivating purpose behind either of these enactments is another matter.

494. 42 U.S.C. § 7410(k) (2000) (stating that an SIP is inadequate if an EPA Administrator finds, *inter alia*, SIP fails to comply "with *any* requirement of this chapter" (emphasis added)).

citizen suit access to state courts can provide the basis for rejecting an SIP and imposing sanctions.⁴⁹⁵

Congress has sought to connect highway construction to environmental protection, but it has still stopped short of claiming highway construction serves the *purpose* of environmental protection. The Federal-Aid Highway Act of 1970 instructed the Secretary of Transportation to ensure that federal highway programs were “consistent with any approved plan for the implementation of any ambient air quality standard for any air quality control region designated pursuant to the Clean Air Act.”⁴⁹⁶ Similarly, in 1991 Congress sought to create an environmentally sound interstate highway system with the Intermodal Surface Transportation Efficiency Act of 1991 (“ISTEA”).⁴⁹⁷ In 1998, Congress reauthorized ISTEA with the Transportation Equity Act for the 21st Century (“TEA-21”),⁴⁹⁸ again reiterating its intent to “minimize transportation-related fuel consumption and air pollution.”⁴⁹⁹

While Congress repeatedly noted the potential environmental impacts of highway construction, none of these statutes establishes that a *purpose* of the federal highway programs is environmental protection. Yet it is the *purpose* of federal funding that controls whether a given condition is sufficiently related for purposes of *Dole*.⁵⁰⁰ These statutory provisions provide an indication of the sort of highways Congress sought to fund; they do not establish environmental protection as a purpose of highway funding. In contrast, the federal statute calling upon states to raise the drinking age echoed the *explicit* purposes of the federal highway programs—safe highways.⁵⁰¹

The conditions on receipt of federal highway funds imposed by the CAA are more expansive than the conditions upheld in either *Sabri* or *Barbour*. In *Sabri*, the Court based its holding on the conclusion that Congress could impose conditions on the receipt of federal money that would prevent the funds from being diverted to other purposes.⁵⁰² Requiring states to adopt various pollution control measures, however, does not prevent the diversion of highway monies to other purposes. In *Barbour*, the D.C. Circuit joined other circuits in holding that Congress could prevent the use of federal funds for injurious purposes.⁵⁰³ This reasoning supports

495. *Id.*

496. Pub. L. No. 91-605, 84 Stat. 1713 (codified as amended at 23 U.S.C. § 101 (2000)).

497. Pub. L. No. 102-240, 105 Stat. 1914 (codified as amended at 23 U.S.C. § 103).

498. Pub. L. No. 105-178, 112 Stat. 107 (1998) (codified as amended in scattered sections of 23 U.S.C.).

499. 49 U.S.C. § 5301(a) (2000).

500. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

501. *See id.* at 208–09.

502. *Sabri v. United States*, 124 S. Ct. 1941, 1947 (2004) (“Congress was within its prerogative to protect spending objects from the menace of local administrators on the take.”).

503. *Barbour v. Wash. Metro. Area Transit Auth.*, 374 F.3d 1161, 1170 (D.C. Cir. 2004).

imposing conditions on the receipt of highway funds under the CAA to prevent the use of *highway funds* on projects that could increase air pollution. Yet, as noted above, the relevant provisions of the CAA are far more expansive. Not only must states refrain from spending federal money on projects that could increase air pollution, they must also comply with numerous conditions that have absolutely nothing to do with transportation, let alone those projects and programs funded with federal highway monies.

Another important distinction is the severity of the financial penalty to which states would be subjected for failing to abide by congressional dictates. *Dole* involved a modest loss of highway funds, only five percent. Yet under the CAA, virtually all highway funds are at risk, with only minor exceptions for special purposes.⁵⁰⁴ In this respect, the CAA creates a situation more like *Skinner* or *Riley* than *Dole*. Thus, even if the CAA's sanctions are not facially suspect, the imposition of sanctions could nonetheless cross the line from inducement to coercion if enough unrelated funds were at stake.⁵⁰⁵

Finally, there is some reason to question whether the imposition of sanctions under the CAA satisfies the notice prong of the *Dole* test. While the CAA itself outlines broad requirements for state implementation plans, many of the details are left to the regulatory process. The text of the CAA may place a given state on notice that a given air quality determination will require the adoption of an "enhanced" vehicle inspection and maintenance program, but the precise contours and costs of such a program are left to the EPA.⁵⁰⁶ Whether a given metropolitan area must adopt pollution control measures at all is, in part, a function of subsequent agency decisions. Under the CAA, the EPA is authorized—indeed, required—to reconsider the national ambient air quality standards periodically.⁵⁰⁷ In recent years, the EPA has tightened air quality standards, thereby requiring states to adopt more stringent air pollution control measures than they may have anticipated.⁵⁰⁸ At the same time, the EPA has adjusted SIP requirements

504. 42 U.S.C. § 7509 (b)(1) (2000). The EPA may not cut off highway funds for projects necessary to "resolve a demonstrated safety problem," mass transit, car pooling programs, construction of high-occupancy vehicle ("HOV") lanes, "programs to limit or restrict vehicle use in downtown areas," and other programs that will "improve air quality and would not encourage single occupancy vehicle capacity." *Id.* § 7509 (b)(1)(A), (B)(vi), (B)(vii).

505. According to Stewart, "Such a condition, accompanying funds which the state cannot afford to forgo, intensifies federal interference with local mechanisms of political accountability by compelling states to enforce against their constituencies restrictions that the constituencies oppose." Stewart, *supra* note 46, at 1255.

506. See generally 42 U.S.C. § 7511a(a)(2)(B), (b)(4), (c)(3); 40 C.F.R. pt. 51, sub. S (2004).

507. 42 U.S.C. § 7409(a), (d).

508. See, e.g., National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652 (July 18, 1997) (to be codified at 40 C.F.R. pt. 50); National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,861 (July 18, 1997) (to be codified at 40 C.F.R. pt. 50). See generally *Am. Trucking Ass'n v. EPA*, 283 F.3d 355 (D.C. Cir. 2002), *modifying* 175 F.3d 1027 (D.C. Cir. 1999) (reviewing the constitutionality of the tightened standards).

midstream to account for changes in atmospheric modeling or revised estimates of upwind state contributions to downwind state pollution problems. In combination, this level of fluidity in SIP requirements, and therefore the conditions imposed on the receipt of state highway funds, could make the highway fund sanction particularly suspect under *Dole*.

The Second Circuit concluded that "*Pennhurst* cannot be read as broadly prohibiting amendments which add retroactive conditions to funding statutes: at most, *Pennhurst* simply requires a clear indication of congressional intent to impose such conditions."⁵⁰⁹ Yet subsequent changes made by Congress may be substantively different than such changes made by a regulatory agency. Particularly, if it is assumed that the states are protected by the "political safeguards of federalism" in the legislative process⁵¹⁰—at least as concerns the imposition of conditions on the receipt of federal funds—it would follow that unambiguous statutory amendments to existing conditions would be more acceptable than the imposition of new conditions through the regulatory process.⁵¹¹

If the CAA sanction regime is potentially suspect under *Dole*, it would be even more so under the various alternative tests for conditional spending proposed by some commentators, such as Professors Baker and Berman. Conditional spending under other federal environmental statutes would be far less vulnerable, however. At the present time, most other federal environmental statutes impose conditions on the use of funds for specific programs. Thus, the Clean Water Act and Safe Drinking Water Act provide funds for state water quality and drinking water programs, respectively, that are to be used in support of related programs that meet specific federal requirements.⁵¹² This sort of "reimbursement" spending does not raise the same constitutional questions as does the use of other monies to induce cooperation in an environmental program.

V. JUDICIAL FEDERALISM AND ENVIRONMENTAL PROTECTION

The conventional wisdom holds that constricting federal regulatory authority necessarily sacrifices environmental protection. According to some environmental groups, the revival of federalism represents a "grave

509. *Counsel v. Dow*, 849 F.2d 731, 735–36 (2d Cir. 1988).

510. *Nevada v. Skinner*, 884 F.2d. 445, 452 (9th Cir. 1989).

511. Professor Somin notes, however, that the political safeguards argument is actually at its weakest in the context of spending power, for whereas state governments will often have strong incentive to resist the assertion of federal power in areas traditionally left to state control, state governments "have incentives to accept and even lobby for conditional federal grants." Somin, *supra* note 379, at 484. For this reason, Somin argues that "there is a greater need for judicial intervention" in the Spending Clause context. *Id.*

512. See 33 U.S.C. § 1252 (2000); 42 U.S.C. § 300j-2.

challenge” that is “threatening the very core of environmental law.”⁵¹³ Recent Commerce Clause decisions, for example, could provide “the groundwork for pulling the rug out from under federal environmental protections.”⁵¹⁴ This presumption is dominant both in the environmental literature and in the language of judicial opinions. Dissenting in *Solid Waste Agency*, Justice Stevens suggested that the impact of the Court’s opinion could well be a return to burning rivers, excessive water pollution and “the destruction of the aquatic environment.”⁵¹⁵ Though widespread, this view overstates the environmental impact of judicially enforced limits on federal regulatory authority.

Judicial reluctance to enforce federalism limits on federal environmental regulation may well stem, at least in part, from concerns that such limits could hamper environmental protection. In *Gibbs v. Babbitt*, for example, Judge Wilkinson suggests that to strike down the ESA take prohibition on Commerce Clause grounds would necessarily limit federal species protection efforts “to only federal lands”⁵¹⁶ and would “call into question the historic power of the federal government to preserve scarce resources in one locality for the future benefit of all America.”⁵¹⁷ If extended to other statutes, Judge Wilkinson wrote, the holding would leave “many environmental harms to be dealt with through state tort law.”⁵¹⁸ Such concerns are misplaced, and their premises are largely unfounded. The federal government’s inability to prohibit the take of endangered species, at least without the inclusion of a jurisdictional requirement to ensure that the given instance was sufficiently tied to commerce, would not affect the federal government’s ability to protect endangered species via the spending power through direct subsidization of conservation efforts, funding of state regulatory programs, and support for programs to increase the awareness of biodiversity concerns and their importance.⁵¹⁹ Limiting the use of, or even

513. SHARON BUCCINO ET AL., NATURAL RES. DEF. COUNCIL, HOSTILE ENVIRONMENT: HOW ACTIVIST JUDGES THREATEN OUR AIR, WATER, AND LAND—AN ENVIRONMENTAL REPORT ON JUDICIAL SELECTION v (2001); see also *supra* notes 4–8 and accompanying text.

514. BUCCINO ET AL., *supra* note 513, at 4.

515. *Solid Waste Agency v. United States Army Corps of Eng’rs*, 531 U.S. 159, 175 (2001) (Stevens, J., dissenting) (accusing the majority opinion of “needlessly weaken[ing] our principal safeguard against toxic water”).

It is worth noting that while both the Environmental Law Institute and Justice Stevens’s *Solid Waste Agency* dissent make reference to the 1969 Cuyahoga River fire as evidence that water quality was in decline prior to the adoption of federal regulation, by the time of the 1969 fire, water quality on most major waterways was improved during the 1960s with respect to some key indices. See *infra* note 589 and accompanying text.

516. *Gibbs v. Babbitt*, 214 F.3d 483, 504 (4th Cir. 2000).

517. *Id.* at 492.

518. *Id.* at 502.

519. It is worth noting that none of these measures implicate the limits on Congress’s ability to adopt conditional spending programs discussed *supra* Part IV.

eliminating, some tools in Congress's environmental policy toolbox is hardly tantamount to proscribing all federal environmental protection.

As discussed above,⁵²⁰ the application of Commerce Clause restrictions to other environmental statutes would not result in the same curtailment of federal regulatory authority insofar as such statutes, like the Surface Mining Control and Reclamation Act⁵²¹ or Clean Air Act,⁵²² target economic activity. Yet even if the Court's federalism doctrines were to disembowel much of the existing federal regulatory structure, it is simply not true that this would leave "many environmental harms to be dealt with by state tort law."⁵²³ The federal government is hardly the nation's sole environmental regulator. To the contrary, most environmental monitoring and enforcement occur at the state and local level,⁵²⁴ and there is no *a priori* reason to assume that states would be unable or unwilling to increase their environmental efforts were federal regulation not already in place.⁵²⁵ Judge Wilkinson's concern is even more misplaced because those environmental concerns most likely to be

520. See *supra* Part III.A.

521. *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 277–81 (1981).

522. *United States v. Ho*, 311 F.3d 589, 598 (5th Cir. 2002).

523. It is worth noting, however, that there is growing environmental literature suggesting that greater reliance on state tort law, or at least upon tort law principles, would improve environmental protection. See generally THE COMMON LAW AND THE ENVIRONMENT: RETHINKING THE STATUTORY BASIS FOR MODERN ENVIRONMENTAL LAW (Roger E. Meiners & Andrew P. Morris eds., 2000); BRUCE YANDLE, COMMON SENSE AND COMMON LAW FOR THE ENVIRONMENT (1997); Keith N. Hylton, *When Should We Prefer Tort Law to Environmental Regulation?*, 41 WASHBURN L.J. 515 (2002); Roger Meiners & Bruce Yandle, *Common Law and the Conceit of Modern Environmental Policy*, 7 GEO. MASON L. REV. 923 (1999); Roger Meiners & Bruce Yandle, *Common Law Environmentalism*, 94 PUB. CHOICE 49 (1998); Todd J. Zywicki, *A Unanimity-Reinforcing Model of Efficiency in the Common Law: An Institutional Comparison of Common Law and Legislative Solutions to Large Number Externality Problems*, 46 CASE W. RES. L. REV. 961 (1996). For a discussion of how tort law principles, if not tort law itself, might enhance environmental protection, see David Schoenbrod, *Protecting the Environment in the Spirit of the Common Law*, in THE COMMON LAW AND THE ENVIRONMENT, *supra*, at 3. At the same time, there is significant academic literature suggesting that this newfound emphasis on tort law is misplaced. See, e.g., Frank B. Cross, *Common Law Conceits: A Comment on Meiners & Yandle*, 7 GEO. MASON L. REV. 965, 977 (1999); Peter S. Menell, *The Limitations of Legal Institutions for Addressing Environmental Risks*, 5 J. ECON. PERSP. 93, 93–94 (1991); Christopher H. Schroeder, *Lost in the Translation: What Environmental Regulation Does that Tort Cannot Duplicate*, 41 WASHBURN L.J. 583, 586 (2002); Andrew McFee Thompson, Comment, *Free Market Environmentalism and the Common Law: Confusion, Nostalgia, and Inconsistency*, 45 EMORY L.J. 1329, 1371–72 (1996). This author is sympathetic to those calling for greater reliance on state tort law principles but not fully convinced that such a transition is practicable. See Adler, *supra* note 11; Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing and Environmental Protection*, 12 DUKE ENVTL. L. & POL'Y F. 39, 69–82 (2001).

524. States are responsible for over eighty-five percent of environmental enforcement action. The State of Texas alone performs twice as many inspections as the EPA, 41,803 to 18,530, respectively, in 1997. Jonathan H. Adler, *Bean Counting for a Better Earth: Environmental Enforcement at the EPA*, REG., Spring 1998, at 40–48.

525. As noted *infra* notes 589–621 and accompanying text, states often regulate well in advance of the federal government.

found beyond Congress's reach are those most likely to be regulated by state and local governments. Indeed, most such environmental concerns are so regulated already, albeit in cooperation with federal efforts.⁵²⁶

While limiting federal regulatory authority will necessarily affect existing federal regulatory programs, it need not result in a significant decline in environmental quality. Indeed, if responded to properly, limitations on federal regulatory authority could actually *improve* environmental performance insofar as it fosters greater reliance on more efficient and effective approaches to environmental protection.⁵²⁷ First, just as constitutional constraints on federal authority limit federal protection, such constraints also limit the federal government's ability to impose environmental harm. Second, in many instances alternatives to federal environmental protection can be just as, if not more, protective of environmental values. Reducing the scope of federal environmental regulation produces greater opportunities for the adoption and implementation of such non-federal efforts. Third, direct regulation is not the federal government's only means of advancing environmental values. Even if the Supreme Court were to impose highly restrictive federalism constraints on federal regulatory power, including the use of conditional spending under *Dole*, the federal government would retain substantial authority to advance environmental protection.

A. LIMITING FEDERAL POWER LIMITS FEDERAL HARM

Most discussions of the environmental impact of the Supreme Court's federalism jurisprudence focus on the extent to which judicially enforced constraints on federal regulatory power will limit the federal government's ability to address environmental concerns. This is a valid concern. At the same time, it must be remembered that expansive federal authority is not inherently protective of the environment. Rather it is a double-edged sword. Just as broad federal authority can be used to protect environmental concerns, a powerful federal government has the ability to cause substantial amounts of environmental harm.

The nation's history is littered with examples of environmental degradation directed, funded, or otherwise encouraged by the federal government. Many of our country's present environmental struggles are the legacy, at least in part, of ill-conceived (albeit sometimes well-intentioned) federal programs. Environmental harm brought about by federal environmental programs span the spectrum from pollution at federal

526. In addition to state pollution control laws, many state and local growth management and land-use regulations can be used to advance specific environmental goals, such as pollution control, wetland conservation, or biodiversity protection. *See generally* Linda Breggin & Susan George, *Planning for Biodiversity: Sources of Authority in State Land Use Laws*, 22 VA. ENVTL. L.J. 81 (2003) (noting the potential to use such statutes for biodiversity conservation).

527. *See* Adler, *supra* note 48, at 264–70.

facilities and the mismanagement of federal lands to ecologically destructive public works projects and wasteful subsidies to farmers and businesses.⁵²⁸ Subsidies to farmers have encouraged the draining of wetlands and waste of water resources;⁵²⁹ subsidies to ranchers have depleted populations of wild species;⁵³⁰ subsidies to corporations lower the costs of polluting fuel sources;⁵³¹ and subsidies to fishermen contribute to overfishing.⁵³²

The federal government's environmental record on federally owned properties is equally poor. The federal government chronically underfunds national park maintenance and restoration, while spending more money on land acquisition.⁵³³ The result is substantial pollution and ecological degradation. The sewer system in Yellowstone National Park, for example, is so degraded that it pollutes local trout streams and groundwater.⁵³⁴ The federal government loses money on timber sales in the national forests, and chronic mismanagement has led to ecosystem decline and a literally explosive threat of catastrophic wildfire.⁵³⁵ The approximately 50,000 sites contaminated by the federal government will cost an estimated \$235–389

528. For examples of how federal policy has encouraged environmental harm, see generally David F. Gerard, *Federal Flood Politics: 150 Years of Environmental Mischief*, in GOVERNMENT VERSUS ENVIRONMENT 59 (Donald R. Leal & Roger E. Meiners eds., 2002); see also Jonathan H. Adler, *Free & Green: A New Approach to Environmental Protection*, 24 HARV. J.L. & PUB. POL'Y 653, 677–81 (2001).

529. See PAUL SCODARI, MEASURING THE BENEFITS OF FEDERAL WETLANDS PROGRAMS 16 (1997) (noting that federal flood-control projects encouraged the loss of forested wetlands in the lower Mississippi valley); Barton H. Thompson, Jr., *People or Prairie Chickens: The Uncertain Search for Optimal Biodiversity*, 51 STAN. L. REV. 1127, 1167–68 (1999).

530. See KARL HESS, JR., THE THOREAU INST., SAVING THE BLACK-FOOTED FERRET: POLICY REFORM AND PRIVATE SECTOR INCENTIVES, <http://www.ti.org/bffhess.html> (last visited Dec. 6, 2004) (on file with the Iowa Law Review).

531. See ENERGY INFO. ADMIN., U.S. DEP'T OF ENERGY, FEDERAL FINANCIAL INTERVENTIONS AND SUBSIDIES IN ENERGY MARKETS 1999: PRIMARY ENERGY app. B, at 63–114 (1999).

532. See Donald R. Leal, *Fueling the Race to the Fish*, in GOVERNMENT VERSUS ENVIRONMENT, *supra* note 528, at 39.

533. See Holly Lippke Fretwell & Michael Podolsky, *A Strategy for Restoring America's National Parks*, 13 DUKE ENVTL. L. & POL'Y F. 143, 149 (2003). See generally ALSTON CHASE, PLAYING GOD IN YELLOWSTONE: THE DESTRUCTION OF AMERICA'S FIRST NATIONAL PARK (1986); KARL HESS, JR., ROCKY TIMES IN ROCKY MOUNTAIN NATIONAL PARK: AN UNNATURAL HISTORY (1993).

534. Fretwell & Podolsky, *supra* note 533, at 149; HOLLY LIPPKKE FRETWELL, PAYING TO PLAY: THE FEE DEMONSTRATION PROGRAM 3 (Prop. & Env't Research Ctr., PERC Policy Series No. PS-17, 1997).

535. See HOLLY LIPPKKE FRETWELL, PROP. & ENV'T RESEARCH CTR., FORESTS: DO WE GET WHAT WE PAY FOR? (1999), <http://www.perc.org/publications/landreports/report2.php> (on file with the Iowa Law Review); U.S. GAO, WESTERN NATIONAL FORESTS: A COHESIVE STRATEGY NEEDED TO ADDRESS CATASTROPHIC WILDFIRE THREATS 6 (1999) (noting an estimated 39 million acres of federal lands are at risk of catastrophic wildfire). See generally ROBERT H. NELSON, A BURNING ISSUE: A CASE FOR ABOLISHING THE U.S. FOREST SERVICE (2000); DONALD LEAL, TURNING A PROFIT ON PUBLIC FORESTS (Prop. & Env't Research Ctr., PERC Policy Series No. PS-4, 1995).

billion to clean up, according to the General Accounting Office.⁵³⁶ The U.S. Department of Energy alone is responsible for environmental contamination at over 100 sites in thirty states, covering approximately two million acres.⁵³⁷

Solid Waste Agency undoubtedly restricted the federal government's ability to regulate activities that harm isolated wetlands. Ironically, the federal government maintained an active policy of draining or otherwise destroying wetlands for well over a century.⁵³⁸ The Swamp Land Act of 1849, for example, provided for the transfer of government-owned "swamp" into private hands on the condition that they were drained.⁵³⁹ In 1900, the Supreme Court characterized wetlands as "the cause of malarial and malignant fevers" and declared that "[t]he police power is never more legitimately exercised than in removing such nuisances."⁵⁴⁰ At the time, the country "was draining everything in sight to make communities healthful."⁵⁴¹ Other government policies, ranging from subsidized irrigation projects and farm subsidies to flood control projects and subsidized disaster insurance, further contributed to wetland loss.⁵⁴² For example, it is estimated that as much as thirty percent of the forested wetland loss in the lower Mississippi Valley was due to incentives created by federal flood-control projects.⁵⁴³ Flood control projects and other policies continued to encourage wetland loss well into the 1970s.⁵⁴⁴

In addition to subsidizing the filling of wetlands and building ecologically disruptive water projects, the Army Corps of Engineers helped despoil the waters it was entrusted to protect. For instance, the Corps contributed substantially to the pollution that rendered Lake Erie a "dead" water body, regularly depositing contaminated dredge from the bottom of the Cuyahoga River into the lake.⁵⁴⁵ This activity continued through the 1960s, even after Congress adopted legislation to force the Corps to clean up

536. U.S. GAO, *FEDERAL FACILITIES: CONSISTENT RELEVANT RISK EVALUATIONS NEEDED FOR PRIORITIZING CLEANUPS* 29 (1996).

537. F.W. Whicker et al., *Avoiding Destructive Remediation at DOE Sites*, 303 SCI. 1615, 1615 (2004).

538. See generally Gerard, *supra* note 528, at 59-77.

539. Swamp Land Act, ch. 84, 9 Stat. 519 (1850).

540. *Leovy v. United States*, 177 U.S. 621, 636 (1900).

541. Robert Beck, *The Movement in the United States to Restoration and Creation of Wetlands*, 34 NAT. RESOURCES J. 781, 781 (1994).

542. See RALPH E. HEIMLICH ET AL., *WETLANDS AND AGRICULTURE: PRIVATE INTERESTS AND PUBLIC BENEFITS*, Agriculture Economic Report No. 765, 24-25 (1998).

543. Robert N. Stavins & Adam B. Jaffe, *Unintended Impacts of Public Investments on Private Decisions: The Depletion of Forested Wetlands*, 80 AM. ECON. REV. 337, 337 (1990).

544. See Gerard, *supra* note 528, at 64.

545. See Arnold W. Reitze, Jr., *Wastes, Water, and Wishful Thinking: The Battle of Lake Erie*, 20 CASE W. RES. L. REV. 5, 35 (1968) (noting that the Corps dumped over one million cubic yards per year from the Cuyahoga and Cleveland's outer harbor each year in the late 1960s).

its act. To the Corps, defiling Lake Erie in this fashion was cost-justified.⁵⁴⁶ Today the Corps has a lead role in helping to restore the Florida Everglades, yet it was the Corps's water projects in southern Florida that helped disrupt the Everglades ecosystem in the first place.⁵⁴⁷ Given its record of environmental harm, it is ironic that the Corps of Engineers, of all federal agencies, now has such a prominent role in environmental protection.⁵⁴⁸

Most of the environmental harm to be laid at the federal government's feet is the result of various spending programs, yet it is the federal government's *regulatory* authority that is most threatened by the Court's federalism jurisprudence, particularly in the Commerce Clause context. Therefore, it is possible that limits on the scope of federal authority will affect the federal government's ability to do environmental good far more than it will curtail the federal government's penchant for encouraging environmental harm. Yet it would be a mistake to assume that federal regulations, including federal *environmental* regulations, are not themselves responsible for some degree of environmental harm.

Examples of federal regulations that have the potential to cause negative environmental effects are more common than one might expect. Technology-based emissions standards, such as those embodied in the CAA and CWA, "play a key role in discouraging innovation" that can lead to environmental improvements.⁵⁴⁹ The federal Superfund program has discouraged the rapid and cost-effective cleanup of many unused or abandoned hazardous waste sites.⁵⁵⁰ The complexity and rigidity of federal hazardous waste regulations can discourage hazardous waste recycling, even though such recycling is officially considered environmentally preferable to the alternatives of incineration or land disposal.⁵⁵¹ The claim here is not that environmental regulations necessarily do more good than harm, but that at least *some* environmental regulations have negative environmental

546. *Id.* at 36.

547. Michael Grunwald, *In Everglades, a Chance for Redemption; Can Agency Reverse the Damage It Has Done?*, WASH. POST, Sept. 14, 2000, at A1. Other federal programs, including sugar subsidies, also played a substantial role in the degradation of the Everglades.

548. *See, e.g.*, Michael Grunwald, *An Agency of Unchecked Clout: Water Projects Roll Past Economic, Environmental Concerns*, WASH. POST, Sept. 10, 2000, at A1 (discussing the environmental legacy of the U.S. Army Corps of Engineers).

549. ENVTL. LAW INST., BARRIERS TO ENVIRONMENTAL TECHNOLOGY INNOVATION AND USE (1998) ("Technology-based emission limits and discharge standards, which are embedded in most of our pollution laws, play a key role in discouraging innovation.").

550. *See, e.g.*, Paul S. Kibel, *The Urban Nexus: Open Space, Brownfields, and Justice*, 25 B.C. ENVTL. AFF. L. REV. 589, 600-05 (1998); Becky L. Jacobs, *Basic Brownfields*, 12 J. NAT. RESOURCES & ENVTL. L. 265, 267-72 (1996-97).

551. *See* Jonathan H. Adler, *Wasted Lights*, REG., Spring 1996, at 15-18 (citing regulatory disincentives for corporations to install more energy efficient lighting).

consequences and that in at least *some* instances environmental regulations are the source of net environmental harm.⁵⁵²

The Endangered Species Act ("ESA") is the federal regulatory statute most at risk under the Court's Commerce Clause jurisprudence, but it would be a mistake to assume a threat to the Endangered Species Act necessarily poses a threat to the survival of endangered species. Enacted in 1973 to save species from the brink of extinction, the ESA has hardly been a success. In over thirty years, fewer than forty of over 1,000 species have been delisted as endangered or threatened.⁵⁵³ In this time more species have been delisted because they went extinct or never should have been listed as endangered in the first place than have been legitimately "recovered" due to the Act.⁵⁵⁴

Among the various factors that contribute to the ESA's ineffectiveness as a conservation tool are the very regulatory strictures most at risk to Commerce Clause challenge. Section 9 prohibits the "take" of endangered species, including significant modification of listed species' habitat. The presence of a listed species can freeze the use of private land, barring everything from timber cutting and ditch digging to plowing a field or building a home. In Riverside County, California, the ESA even prevented private landowners from disking to clear firebreaks on their own land lest they disturb the habitat of the Stephens' kangaroo rat.⁵⁵⁵ Consequently, private landowners are penalized for owning endangered species habitat.⁵⁵⁶

In this fashion, the ESA creates economic incentives for private landowners to engage in the deliberate destruction of actual or potential wildlife habitat and to forego or prevent future habitat creation on privately

552. See generally Frank B. Cross, *Paradoxical Perils of the Precautionary Principle*, 53 WASH. & LEE L. REV. 851 (1996).

553. See U.S. FISH & WILDLIFE SERV., THREATENED AND ENDANGERED SPECIES SYSTEM, http://ecos.fws.gov/tess_public/TESSWebpageDelisted?listings=0 (last visited April 20, 2004) (on file with the Iowa Law Review).

554. *Id.*; see also Robert E. Gordon, Jr. et al., *Conservation Under the Endangered Species Act*, 23 ENVTL. INT'L 359, 359 (1997); Ike C. Sugg, *Caught in the Act: Evaluating the Endangered Species Act, Its Effects on Man and Prospects for Reform*, 24 CUMB. L. REV. 1, 42-44 (1993). It is worth noting that many of the alleged "successes" of the ESA are nothing of the kind and involve species that were either never in danger of extinction or were helped by exogenous factors. See *id.* (discussing the examples of the Palau dove, Palau fantail flycatcher, Palau owl, Rydberg milk-veitch, and American alligator).

555. See Ike C. Sugg, *California Fires—Losing Houses, Saving Rats*, WALL ST. J., Nov. 10, 1993, at A20. While there is dispute whether disking firebreaks would have adequately protected homes in Riverside County from the fire threat, it is undisputed that landowners were threatened with prosecution under the ESA if they were to use the traditional method of disking to clear firebreaks on their own land. *Id.*; see also Ike C. Sugg, Editorial, *Environmental Overprotection*, WASH. POST, Aug. 9, 2004, at A18.

556. As explained by Sam Hamilton, former Fish and Wildlife Service administrator for the state of Texas: "The incentives are wrong here. If I have a rare metal on my property, its value goes up. But if a rare bird occupies the land, its value disappears." Betsy Carpenter, *The Best-Laid Plans*, U.S. NEWS & WORLD REP., Oct. 4, 1993, at 89 (quoting Hamilton).

owned land.⁵⁵⁷ Professors Lueck and Michael report that forest owners respond to the likelihood of ESA regulation by harvesting timber and reducing the age at which timber is harvested.⁵⁵⁸ Such preemptive habitat destruction could well “cause a long-run reduction in the habitat and population” of endangered species.⁵⁵⁹ In some instances, it is likely that the economic incentives created by the Act result in the *net loss* of species habitat. That is, in some cases the ESA may be responsible for more habitat loss than habitat protection.⁵⁶⁰

Professors Lueck and Michael are not alone in their findings. A study in *Conservation Biology* further reports that just as many landowners responded to the listing of Preble’s meadow jumping mouse by destroying potential habitat as undertook new conservation efforts.⁵⁶¹ It also found a majority of landowners would not allow biologists on their land to assess mouse populations out of fear that land-use restrictions would follow the discovery of a mouse on their land.⁵⁶² The Fish and Wildlife Service also acknowledges that its own regulations can lead to habitat loss on private land. In the Pacific northwest, land-use restrictions imposed to protect the northern spotted owl made private landowners fear the lost use of their land and that “this concern or fear has accelerated harvest rotations in an effort to avoid the regrowth of habitat that is useable by owls.”⁵⁶³

Insofar as ESA regulation discourages private land conservation, it is undermining species conservation efforts. The majority of endangered and threatened species depend on private land for some portion of their habitat,⁵⁶⁴ so by discouraging private land conservation, the ESA could well have a devastating impact on species conservation efforts. While there is no conclusive evidence as to the net effect of the ESA on species conservation on private land, there is more than enough evidence to challenge the prevailing

557. For a broader discussion of this, see Michael J. Bean, *The Endangered Species Act and Private Land: Four Lessons Learned from the Past Quarter Century*, 28 ENVTL. L. REP. 10701 (1998).

558. Dean Lueck & Jeffrey A. Michael, *Preemptive Habitat Destruction Under the Endangered Species Act*, 46 J.L. & ECON. 27, 27 (2003).

559. *Id.* at 30.

560. Dr. Larry McKinney, Director of Resource Protection for the Texas Parks and Wildlife Department, concluded: “While I have no hard evidence to prove it, I am convinced that more habitat for the black-capped vireo, and especially the golden-cheeked warbler, has been lost in those areas of Texas since the listing of these birds than would have been lost without the ESA at all.” Larry McKinney, *Reauthorizing the Endangered Species Act—Incentives for Rural Landowners*, in BUILDING ECONOMIC INCENTIVES INTO THE ENDANGERED SPECIES ACT 71, 74 (Defenders of Wildlife ed., 1993).

561. See generally Amara Brook et al., *Landowners’ Responses to an Endangered Species Act Listing and Implications for Encouraging Conservation*, 17 CONSERVATION BIOLOGY 1638 (2003).

562. *Id.*

563. 60 Fed. Reg. 9484, 9507–08 (proposed Feb. 17, 1995) (to be codified at 50 C.F.R. pt. 17).

564. U.S. GAO, ENDANGERED SPECIES ACT: INFORMATION ON SPECIES PROTECTION ON NONFEDERAL LANDS 4 (1994).

assumption that limitations on ESA regulation of private land will result in net harm to endangered species. If courts hold that the Commerce Clause limits federal regulation of private land, it may even prompt the federal government to adopt alternative approaches to species conservation that do not produce the same unintended consequences and conserve species in a more effective and equitable manner.

The imposition of federal priorities on unconsenting states can also have negative environmental results. In many cases, the assertion of federal regulatory authority to advance environmental goals will safeguard important environmental concerns. But in other cases, federal authority can prevent states from adopting environmentally preferable alternatives. Federal preemption of more protective state environmental standards can inhibit more effective environmental protection, as well as experimentation with new approaches of addressing environmental concerns.⁵⁶⁵

Sovereign immunity will frustrate some environmentalist suits against recalcitrant states, but it will also limit corporate efforts to preempt local decisions about land-use and community character. In *Federal Maritime Commission v. South Carolina State Ports Authority*,⁵⁶⁶ for instance, a cruise ship operator sought to force South Carolina to allow the berthing of a gambling boat. Due to South Carolina's sovereign immunity, the private cruise ship operator could not force the port authority to allow its ship to berth at the port absent federal intervention.⁵⁶⁷ Opposition to the boat may have been driven by concerns about gambling or specific parochial interests in this case, but it illustrates how limitations on federal regulatory authority can limit the federal government's ability to impose development or other potentially environmentally harmful activity on unconsenting states. Coastal communities throughout the nation, including in South Carolina, are concerned with the negative environmental impacts of congested ports, which include air and water pollution, as well as harm to sensitive coastal lands.⁵⁶⁸

Judicial reinvigoration of federalism limits on the spending power would have the greatest impact on the Clean Air Act ("CAA"). Here again, there is reason to question whether such limitations would result in net environmental harm. Under the CAA, the federal government uses the

565. See, e.g., *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 124 S. Ct. 1756, 1761–64 (2004) (holding local low emission vehicles fleet purchase rules preempted by Clean Air Act); *United States v. Locke*, 529 U.S. 89, 115 (2000) (holding state oil spill regulations preempted by Ports and Waterways Safety Act); see also Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 577 (2001) ("[W]hen industry seeks preemption of state standards, less stringent regulatory standards in the affected states generally result.").

566. 535 U.S. 743 (2002).

567. *Id.* at 747–51.

568. See Daniel Machalaba, *U.S. Ports Hit a Storm*, WALL ST. J., Mar. 10, 2004, at B1.

threat of sanctions to impose federal air pollution control priorities on state governments. Specifically, the threatened loss of highway funds induces states to adopt that mix of air pollution control measures preferred by federal policymakers, *even when an alternative mix of pollution control measures may produce greater environmental results.*

The adoption of one air pollution control measure may increase other forms of pollution or otherwise contribute to other environmental problems.⁵⁶⁹ The federal gasoline oxygenate requirement is a notorious example of how environmental regulation can cause environmental harm.⁵⁷⁰ Under the CAA, oil companies are required to use fuel additives to increase the oxygen content of fuels in certain non-attainment areas.⁵⁷¹ Although ostensibly designed to reduce automotive emissions, there is substantial scientific evidence that oxygenated fuels provide little environmental benefit.⁵⁷² The addition of one oxygenate, ethanol, can reduce some emissions at the expense of increasing others.⁵⁷³ Another oxygenate in wide use until recently, methyl tertiary butyl ether ("MTBE"), has been linked to widespread water pollution problems throughout the country.⁵⁷⁴

Several states sought relief from the various federal fuel mandates, preferring to adopt other measures to reduce auto-related air pollution, but were precluded from doing so under the CAA.⁵⁷⁵ In these states, air pollution may be worse than it would otherwise be due to the assertion of federal regulatory authority. This is not the only instance in which CAA mandates may impede the achievement of optimal levels of environmental

569. As Justice Breyer, then Judge Breyer, observed, "[O]ne can find many examples of regulators' ignoring one program's safety or environmental effects upon another." STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 22 (1993).

570. See generally Jonathan H. Adler, *Clean Fuels, Dirty Air*, in *ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS* (Michael S. Greve & Fred L. Smith, Jr. eds., 1992).

571. 42 U.S.C. § 7545(k)(2)(B) (2000).

572. NAT'L RESEARCH COUNCIL, *OZONE-FORMING POTENTIAL OF REFORMULATED GASOLINE* 7 (1999) ("The use of commonly available oxygenates in RFG has little impact on improving ozone air quality and has some disadvantages."); *id.* at 4 (noting it is "not certain" whether any of the documented improvement in urban air quality is due to the use of reformulated gasoline). See generally EPA, *ACHIEVING CLEAN AIR AND CLEAN WATER: REPORT OF THE BLUE RIBBON PANEL ON OXYGENATES IN GASOLINE* (1999). At times, the EPA has also sought to use the federal oxygenate requirement as much to benefit ethanol producers and other agricultural interests as much as to improve air quality. See *Am. Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995).

573. See *Davis v. EPA*, 348 F.3d 772, 777 (9th Cir. 2003) (noting that the federal oxygenate requirement increases emissions of nitrogen oxides); HAROLD M. HASKEW ET AL., *CAL. ENVTL. PROT. AGENCY, FUEL PERMEATION FROM AUTOMOTIVE SYSTEMS* 5 (2004) (documenting increased auto-related emissions from the use of ethanol as an oxygenate), <http://www.arb.ca.gov/fuels/gasoline/permeation/090204finalrpt.pdf>.

574. See generally U.S. GAO, *MTBE CONTAMINATION FROM UNDERGROUND STORAGE TANKS* (2002) (reporting that a majority of states have found MTBE in groundwater); see also EPA, *supra* note 572.

575. See *Davis*, 348 F.3d at 785.

protection. Because the formation of tropospheric ozone ("smog") is in part dependent upon ratios of ozone precursors in the ambient air, measures that reduce ozone levels in some cities increase ozone levels somewhere else.⁵⁷⁶ Earlier air pollution control provisions adopted as part of the CAA Amendments of 1977 were tailored to advantage regional coal producers at the expense of their competitors, and air quality suffered as a result.⁵⁷⁷

If the federal government's ability to condition the receipt of highway funds on state implementation of detailed pollution control requirements were more limited, it is likely that many states would adopt a different mix of air pollution control measures. While some may fear that such state flexibility could result in less protective environmental regulations,⁵⁷⁸ the experience with the CAA suggests that at least some states would adopt a mix of air pollution control measures that are more appropriate to their regions' specific air pollution concerns and would be more attentive to the potential negative consequences of specific federally-preferred pollution control strategies. Without the ability to condition highway funding on all aspects of air pollution control policy, the federal government would retain substantial ability to influence state decision-making—conditional spending could still be used in a less "coercive" manner—but it would lack the ability to force states to adopt specific measures over state opposition. Insofar as the CAA discourages some states from adopting locally optimal air pollution control measures, this could be environmentally beneficial.

It is important to note that the claim here is not that the extension of federal power always or inexorably results in net environmental harm. The federal government has encouraged substantial environmental progress, just as it has caused, or otherwise encouraged, much environmental despoliation. The impact of federal power on environmental protection is a function of what the federal government does. A more powerful federal government is no less prone to causing or subsidizing environmentally destructive activities than it is to effectively controlling environmental harms. An increase in federal power does not necessarily translate into increased environmental protection. By the same token, the curtailment of federal power will not necessarily lead to greater environmental harm.

576. See, e.g., NAT'L ACAD. OF SCIENCES, RETHINKING THE OZONE PROBLEM IN URBAN AND REGIONAL AIR POLLUTION 11 (1991) ("[Nitrogen oxide (NO_x)] reductions can have either a beneficial or detrimental effect on ozone concentrations, depending on the locations and emissions rates of [volatile organic compound] and NO_x sources in a region.").

577. See generally BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL/DIRTY AIR (1981) (detailing the influence of regional and other economic interests on the 1997 Clean Air Act Amendments).

578. See *infra* note 598 and sources cited therein.

B. NON-FEDERAL ENVIRONMENTAL PROTECTION

The federal government is not the only provider of environmental protection. Many of today's federal environmental programs were preceded by—if not modeled on—state efforts.⁵⁷⁹ States regularly adopt environmental measures that are more protective than the federal “floor,” and most innovative environmental reforms have their roots in state and local efforts. Yet existing federal programs often obstruct or discourage state reforms.⁵⁸⁰ In particular, the existing regulatory system is stultified and inhibits the evolution of policy measures to account for new information and knowledge or changing circumstances.⁵⁸¹ Even so-called “cooperative” efforts, under which the federal government funds approved state environmental programs, can distort state and local priorities, redirecting resources from more to less urgent environmental matters. Insofar as the Court's articulated federalism principles reduce the federal government's ability to dictate environmental policy from Washington, D.C., states will have greater opportunity to pick up the slack.

Decentralized approaches to environmental protection have many potential advantages over centralized regulatory regimes. Decentralization can enhance the efficiency and effectiveness of environmental controls.⁵⁸² No less important, decentralization can allow for experimentation with alternative approaches to environmental protection with which there is relatively little practical experience.⁵⁸³ “By decentralizing environmental decision making, we may be able to obtain improved responsiveness to changing circumstances and new information,” notes Professor Farber.⁵⁸⁴ There is no reason, *a priori*, to view the decentralization of environmental protection as a threat to environmental protection, as opposed to a way of making it “more effective.”⁵⁸⁵

The potential environmental benefits of decentralization are not merely theoretical. The history and current practice of state and local environmental protection provide ample reason to question the assumption that lessening federal environmental regulatory authority *necessarily* results in

579. Percival, *supra* note 9, at 1172.

580. See DANIEL A. FARBER, *ECO-PRAGMATISM: MAKING SENSIBLE ENVIRONMENTAL DECISIONS IN AN UNCERTAIN WORLD* 181 (1999) (“Federal regulations tend to be insensitive to differences in technological and economic constraints and to variations in environmental problems.”).

581. *Id.* at 179 (noting that “the information base is itself subject to rapid change”); see also HENRY N. BUTLER & JONATHAN R. MACEY, *USING FEDERALISM TO IMPROVE ENVIRONMENTAL POLICY* 1 (1996) (noting that federal environmental regulations are a substantial source of “inflexibility and inertia”).

582. See FARBER, *supra* note 580, at 179 (“One way to improve environmental learning is decentralization—moving decision making from large federal bureaucracies to the private sector or to smaller units of government.”); Adler, *supra* note 48, at 265–70.

583. See Adler, *supra* note 48, at 266–67.

584. FARBER, *supra* note 580, at 180.

585. *Id.* at 183.

lessened environmental protection. While the federal government is the most conspicuous actor on the environmental stage, state and local governments are the *avant garde*, developing innovative efforts to enhance the ecological and economic performance of environmental protection.⁵⁸⁶ From brownfield redevelopment plans and audit privilege rules to property-based water management and unified, multimedia permitting systems, states are trying to find ways of maximizing the return on investments in environmental policy.⁵⁸⁷

The conventional wisdom holds that federal environmental regulation was necessary because states failed to adopt adequate environmental measures. This view ignores the substantial environmental progress in many areas due to state and local efforts adopted prior to the enactment of most major federal environmental laws.⁵⁸⁸ The EPA's first national water quality inventory, conducted just one year after adoption of the Clean Water Act ("CWA"), found that there had been substantial improvement in water quality in major waterways over the preceding decade.⁵⁸⁹ While water quality problems persisted, the evidence suggests that states began addressing those water quality problems that were clearly identified and understood well before the federal government.

Several studies of air pollution similarly find evidence of significant environmental improvement prior to the adoption of federal environmental regulation. Historically, the first municipal smoke ordinances were adopted in the late nineteenth century, and the number of cities with effective local controls increased dramatically in the post-World War II period.⁵⁹⁰ In a comprehensive study of air pollution trends, Indur Goklany documents that levels of key pollutants were in decline prior to adoption of the 1970 Clean

586. See Revesz, *supra* note 565, at 636 ("[T]he states, not the federal government, produced the most innovation in pollution control legislation in the 1990s.").

587. In the area of hazardous waste site cleanups and brownfield redevelopment, for example, states are responsible for "the bulk of the initiative," whereas the federal government's role "remains limited and largely reactive." *Id.* at 603. For additional examples of state-level experimentation, see ALEXANDER VOLOKH ET AL., NAT'L ENVTL. POLICY INST. & REASON PUB. POLICY INST., RACE TO THE TOP: THE INNOVATIVE FACE OF STATE ENVIRONMENTAL MANAGEMENT (1998).

588. See Revesz, *supra* note 565, at 578-79 ("[T]he view widely held in the legal literature that the states ignored environmental problems before 1970 is simply not correct.").

589. A. Myrick Freeman, *Water Pollution Policy*, in PUBLIC POLICIES FOR ENVIRONMENTAL PROTECTION 169, 187 (Paul Portney & Robert N. Stavins eds., 2d. ed. 2000) (noting that the results of the EPA's first National Water Quality Inventory, conducted in 1973, "indicated significant improvements in most major waterways over the preceding decade, at least in regard to organic wastes and bacteria").

590. See Arthur C. Stern, *History of Air Pollution Legislation in the United States*, 32 J. AIR POLLUTION CONTROL ASS'N 44, 44 (1982). For details of one city's efforts to reduce air pollution prior to the adoption of federal environmental regulation, see ROY LUBOVE, TWENTIETH-CENTURY PITTSBURGH: GOVERNMENT, BUSINESS, AND ENVIRONMENTAL CHANGE 106-41 (1969). See also Cliff I. Davidson, *Air Pollution in Pittsburgh: A Historical Perspective*, 29 J. AIR POLLUTION CONTROL ASS'N 1035 (1979).

Air Act Amendments.⁵⁹¹ More significantly, the rate of improvement for some pollutants was greater *prior* to the adoption of federal controls than after.⁵⁹² A study by Paul Portney of Resources for the Future also found that “at least some measures of air quality were improving at an impressive rate before 1970.”⁵⁹³ Research by Robert Crandall of the Brookings Institution similarly concluded that pre-federal air pollution control efforts were more successful than is typically assumed: “Pollution reduction was more effective in the 1960s, before there was a serious federal policy dealing with stationary sources, than since the 1970 Clean Air Act Amendments.”⁵⁹⁴ These studies suggest that state and local governments had the ability and motivation to address identified environmental concerns, such as air pollution.⁵⁹⁵

As with water pollution, once a given air pollution problem was clearly identified and understood, state and local governments began enacting measures to address these concerns before the federal government got into the act. Indeed, in some cases the early state efforts became the model for subsequent federal measures. In others, federal regulations were adopted, with the support of industry, to preempt more stringent or less uniform state regulatory standards.⁵⁹⁶ While it is common to suggest that federal intervention was necessary because state and local efforts “failed” to protect environmental quality, the historical record is more ambiguous. Prior to the 1970s, the federal government failed to fulfill many of its preexisting environmental obligations. Yet, as discussed above, some state and local governments were beginning to make substantial progress in addressing local environmental concerns.⁵⁹⁷

A common concern voiced in environmental policy debates is that lessening federal authority will lead to environmentally harmful interjurisdictional competition. Specifically, the lack of federal regulation will set off a “race to the bottom” in which state jurisdictions compete for corporate investment and economic development by reducing

591. INDUR M. GOKLANY, *CLEARING THE AIR: THE REAL STORY OF THE WAR ON AIR POLLUTION* (1999).

592. *Id.* at 54–57.

593. Paul R. Portney, *Air Pollution Policy*, in *PUBLIC POLICIES FOR ENVIRONMENTAL PROTECTION*, *supra* note 589, at 77.

594. ROBERT W. CRANDALL, *CONTROLLING INDUSTRIAL POLLUTION: THE ECONOMICS AND POLITICS OF CLEAN AIR* 19 (1983).

595. As noted by Portney, “These data . . . call into question one of the fundamental premises behind the [Clean Air Act]— that states and local governments would never impose the controls necessary to achieve healthful air.” Portney, *supra* note 593, at 77.

596. See Elliott et al., *supra* note 18, at 330–33.

597. See, e.g., Adler, *supra* note 11, at 133–38; GOKLANY, *supra* note 591; Adler, *supra* note 93, at 47–53 (documenting state wetland regulation prior to the adoption of federal wetlands regulations).

environmental safeguards.⁵⁹⁸ The theory is based upon the intuitive notion, supported by some empirical evidence,⁵⁹⁹ that firms are more likely to invest in states with less costly regulatory regimes. This concern is the “central underpinning” of federal environmental regulation⁶⁰⁰ and has been relied upon by courts to uphold federal environmental statutes against constitutional challenges.⁶⁰¹ Yet on both theoretical and empirical grounds, concerns about an environmental race to the bottom seem overstated.

Professor Revesz has demonstrated that the framework underlying the race to the bottom theory has several analytical failings.⁶⁰² Firms base siting and relocation decisions on a wide range of criteria, of which environmental regulation is only one, and there is ample evidence that other factors typically play a greater role in such decisions.⁶⁰³ Tax rates, infrastructure, availability, cost, skill of local labor, and other regulatory policies are also important considerations for businesses. If the race to the bottom operates in the environmental sphere, there is every reason to expect it to operate to the same extent in these other contexts, suggesting that federal regulation would be necessary across the board.⁶⁰⁴ In this way, the race to the bottom theory—if taken seriously—proves too much. In addition, the adoption of minimum federal environmental standards to prevent a race to the bottom in environmental policy would not eliminate the competitive pressures. Rather, it would shift them to other contexts, and the hypothesized welfare

598. Kirsten H. Engel, *State Environmental Standard-Setting: Is There a “Race” and Is It “To the Bottom”*?, 48 HASTINGS L.J. 271, 274 (1997); Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 597–99 (1996); Stewart, *supra* note 46, at 1212; Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, 14 YALE J. ON REG. 67, 69 (1996).

599. See, e.g., WAYNE B. GRAY, MANUFACTURING PLANT LOCATION: DOES STATE POLLUTION REGULATION MATTER? (Nat’l Bureau of Econ. Research, Working Paper No. W5880, 1997) (finding states with more stringent environmental regulation have fewer new manufacturing plants).

600. CLIFFORD RECHTSCHAFFEN & DAVID L. MARKELL, REINVENTING ENVIRONMENTAL ENFORCEMENT & THE STATE/FEDERAL RELATIONSHIP 22–25 (2003).

601. See, e.g., *Solid Waste Agency v. United States Army Corps of Eng’rs*, 531 U.S. 159, 196–97 (2001) (citing the desire to avoid destructive interstate competition as a basis for federal environmental regulation); *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 281–82 (1981) (deferring to Congress’s finding that nationwide standards are “essential” to prevent “destructive interstate competition” that might undermine environmental standards); *Gibbs v. Babbitt*, 214 F.3d 483, 501–02 (4th Cir. 2000); *Nat’l Ass’n of Home Builders v. Babbitt*, 130 F.3d 1041, 1054–56 (D.C. Cir. 1997) (Wald, J.) (stating that federal regulation removes incentives for states to adopt lower environmental standards in order to attract development, thereby preventing a destructive “race to the bottom”).

602. See Richard Revesz, *Rehabilitating Interstate Competition: Rethinking the ‘Race-to-the-Bottom’ Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1233–44 (1992).

603. Richard Revesz, *Federalism and Environmental Regulation: A Normative Critique*, in *THE NEW FEDERALISM: CAN THE STATES BE TRUSTED?* 105 (John Ferejohn & Barry R. Weingast eds., 1997).

604. *Id.* at 107.

losses would remain.⁶⁰⁵ Professor Revesz also points out that the same dynamic that could theoretically produce systematic environmental underregulation could also produce overregulation.⁶⁰⁶ If states are more aggressive at competing for industry through tax policy than through environmental policy, the likely result would be suboptimal tax rates but superoptimal levels of regulation.⁶⁰⁷

The theory persists, despite its flaws, because it is reasonable to assume that jurisdictions will seek to create a comparatively more attractive investment climate in order to better compete economically. Insofar as environmental regulations impose significant economic burdens on existing and prospective economic actors in a given area, it is also reasonable to expect jurisdictions to act so as to lessen such burdens.⁶⁰⁸ Recent empirical work suggests that this is in fact the case as government officials acknowledge efforts to reduce the economic pinch of environmental regulation for economic purposes.⁶⁰⁹ Yet for this to prove the race to the bottom hypothesis, it is necessary to further assume that reducing the economic cost of environmental regulation necessarily reduces the level of environmental protection. While such a conclusion may be justified in certain contexts, it cannot be assumed across the board. As not all environmental protection measures produce equivalent levels of environmental protection at equivalent costs, it should be possible for many jurisdictions to reduce the economic cost associated with environmental measures without sacrificing environmental quality.⁶¹⁰ In addition, it is important to recognize that many states compete for citizens by seeking to improve their environmental performance. Because many people may be more likely to move to a state with high levels of environmental quality, this

605. *Id.* at 106.

606. Richard Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535, 539 (1997); Revesz, *supra* note 602, at 1241–42.

607. Revesz, *supra* note 603, at 104–05.

608. It is important to note here that a premise of the race to the bottom argument is that environmental regulations impose substantial costs on business activity. If this were not the case there would be no reason to reduce environmental regulation in order to attract economic investment. This premise contradicts common claims that environmental regulations do not reduce job growth or otherwise harm economic development.

609. See generally Scott R. Saleska & Kirsten H. Engel, “Facts Are Stubborn Things”: An Empirical Reality Check in the Theoretical Debate Over the Race-to-the-Bottom in State Environmental Standard Setting, 8 CORNELL J.L. & PUB. POL’Y 55 (1998) (citing empirical evidence purporting to support race-to-the-bottom claims); Engel, *supra* note 598 (same).

610. For example, if the use of tradable emission credits can reduce the cost of achieving a given level of pollution reduction at less cost than a similarly protective technology standard, it should be possible for a state to reduce the economic burdens of environmental regulation without lessening the level of health and environmental protection. Indeed, it could be possible to both reduce the cost of regulatory compliance and increase the level of environmental protection simultaneously. See Jonathan H. Adler, *The Ducks Stop Here? The Environmental Challenge to Federalism*, 9 SUP. CT. ECON. REV. 205, 226 (2001).

creates pressure for states to adopt more protective environmental policies.
611

In practice, the race to the bottom has not been observed in environmental policy.⁶¹² As already noted, state and local governments often regulated well before the federal government became involved. While this fact alone does not disprove the race to the bottom thesis—such state regulations could still have been suboptimal when compared to the federal alternative or some theoretical ideal—they demonstrate that competitive pressures do not preclude effective state regulation. More significantly, where the race to the bottom thesis has been directly tested in the context of wetlands, the pattern of state regulation has been *precisely the opposite* of what the theory would predict.

Were there a race to the bottom in the context of wetlands regulation, those states with the most wetlands should be least likely to regulate development of such areas. As explained by Professors Houck and Rolland, “[T]he larger a state’s wetland inventory, the more important it is to the nation, but the less important saving it may appear to the state itself—indeed the more onerous the burden of protecting it will appear.”⁶¹³ Imposition of wetland regulations in a state in which there is a greater proportion of wetlands as a percentage of the state’s total land area will impose greater costs than the imposition of similar regulations in a state in which wetlands represent a smaller proportion of its land area. Thus, one would expect such states with more wetlands to begin regulating after those states with fewer wetlands, if they were to ever regulate at all.

The pattern of state wetland regulation prior to 1975—when the federal government was ordered by a federal court to regulate wetlands under § 404 of the CWA⁶¹⁴—is precisely the opposite of what the race to the bottom

611. See Merritt, *supra* note 93, at 706 (“Residents have flocked to some western states that use aggressive measures to protect the environment—despite the fact that these laws impose significant costs on business and taxpayers.”).

612. Several economic studies have failed to find empirical evidence of any race to the bottom in environmental policy. See generally John A. List & Shelby Gerking, *Regulatory Federalism and Environmental Protection in the United States*, 40 J. REGIONAL SCI. 453 (2000) (providing empirical evidence); Daniel L. Millimet, *Assessing the Empirical Impact of Environmental Federalism*, 43 J. REGIONAL SCI. 711 (2003) (same); Daniel L. Millimet & John A. List, *A Natural Experiment on the ‘Race to the Bottom’ Hypothesis: Testing for Stochastic Dominance in Temporal Pollution Trends*, 65 OXFORD BULL. ECON. & STAT. 395 (2003) (same); HILARY SIGMAN, *LETTING STATES DO THE DIRTY WORK: STATE RESPONSIBILITY FOR FEDERAL ENVIRONMENTAL REGULATION* (Nat’l Bureau of Econ. Research, Working Paper No. 9451, 2003) (suggesting that decentralization of environmental decision-making “allows welfare-based heterogeneity in stringency”).

613. Oliver A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 MD. L. REV. 1242, 1253 (1995).

614. *Natural Res. Def. Council v. Callaway*, 392 F. Supp. 685, (D.D.C. 1975); see also *United States v. Holland*, 373 F. Supp. 665, (M.D. Fla. 1974) (upholding Corps’s jurisdiction over nonnavigable waters and intertidal wetlands connected to navigable waters).

theory would predict.⁶¹⁵ According to the National Wetland Inventory, all fifteen states in the continental United States with more than ten percent of their land area in wetlands adopted wetland protection measures prior to 1975.⁶¹⁶ As one review of state wetland regulations noted, “[M]ost of the states with the largest wetland acreages have adopted wetland regulatory efforts for all or a portion of their wetlands.”⁶¹⁷ Although the adoption of such measures can entail significant costs, the states with the most wetlands clearly determined that the value of protecting wetlands was greater than the attendant costs of regulating them—interstate competitive pressures notwithstanding.

There is also no evidence that interstate competition has resulted in any erosion of state wetland protection efforts, as “no state has repealed or substantially undercut its wetland statutes once adopted.”⁶¹⁸ To the contrary, when the Supreme Court narrowed the jurisdictional scope of CWA, including the protection of wetlands under § 404, some states quickly adopted additional regulatory measures to fill the gap.⁶¹⁹ In fact, after the Supreme Court found that the proposed balefill site at issue in *Solid Waste Agency* was beyond the scope of federal jurisdiction, local government agencies that previously had supported the project quickly acted to preserve the land at issue.⁶²⁰ While not every state has adopted post-*Solid Waste Agency* measures to address isolated wetlands, one reason for this might be the continuing uncertainty as to the precise scope of the federal government’s regulatory authority post-*Solid Waste Agency*—and therefore continuing

615. See Adler, *supra* note 93, at 47–54.

616. JON A. KUSLER ET AL., ASS’N OF STATE WETLAND MANAGERS, STATE WETLAND REGULATION: STATUS OF PROGRAMS AND EMERGING TRENDS 5–8 tbl.1. The states in question are Alabama, Delaware, Florida, Georgia, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, New Jersey, North Carolina, South Carolina, and Wisconsin.

617. *Id.* at 3.

618. *Id.* at 20.

619. The state of Ohio, for example, enacted an “emergency measure” to extend state regulations to isolated wetlands in July 2001. 2001 Ohio H.B. 231. More broadly, Michael Gerhardt reports that many states responded to the decision by considering, if not adopting, additional protections for isolated wetlands:

[A]t least 19 states have responded to the decision by either enacting or recommending the enactment of laws to fill the void left as a result of the Court’s decision. These states include, inter alia, California, Connecticut, Illinois, New Jersey, North Carolina, Ohio, Oregon, South Carolina, Virginia, and Wisconsin. These reactions are a clear illustration of environmental federalism in action.

Michael J. Gerhardt, *The Curious Flight of the Migratory Bird Rule*, 31 ENVTL. L. REP. 11,079, 11,085 (2001).

620. See Michael Higgins, *Balefill Battle Winds Down: State Offer To Buy Bartlett Site May End 16-year Feud*, CHI. TRIB., Aug. 10, 2001, at Metro 1; Sue Ter Maat, *With Balefill Out of Game, Developers Have Whole New Playing Field*, CHI. DAILY HERALD, Jan. 12, 2003, at 1.

uncertainty about the need for state interventions.⁶²¹ It is possible that once the precise scope of the federal government's CWA authority is clarified, more states will follow suit, much as local agencies acted to be protected from the *Solid Waste Agency* decision only after it was clear the federal government would not.

Limiting federal regulatory authority would certainly create room for the expansion of state and local regulatory efforts. At the same time, such contraction is likely to create niches filled by non-governmental efforts. The United States has a long and proud tradition of private conservation efforts, ranging from the earliest hunting associations and conservation organizations to modern land trusts and "enviro-capitalists." To return to the wetlands context, groups ranging from Ducks Unlimited at the national level to Chesapeake Wildlife Heritage at the local level engage in substantial wetland restoration and conservation efforts, both independently and in conjunction with government agencies.⁶²² Other groups, such as the Peregrine Fund, National Wild Turkey Federation, and Oregon Water Trust, to name but a few, focus their efforts on particular species, habitats, or areas of environmental concern. Insofar as there is evidence that government efforts to support public goods may crowd out private investments in such goods,⁶²³ it is possible that the curtailment of federal regulatory efforts would provide more room for private efforts. By the same token, insofar as existing federal regulations discourage private conservation efforts, as has been documented in the context of endangered species,⁶²⁴ the curtailment of federal regulatory authority could remove significant barriers to greater private conservation efforts.

C. A CONTINUING FEDERAL ROLE

This Article's focus on the extent to which federalism doctrines could, and perhaps should, curtail federal regulatory authority in the environmental context should not obscure the fact that federal regulatory power is likely to remain substantial for the foreseeable future. Federalism limits the regulatory power of the federal government, but it does not eviscerate federal efforts. Where federalism's pinch is most severe, it is

621. *Regarding Implications of the Supreme Court's SWANCC Decision: Hearing Before Comm. on House Gov't Reform, Subcomm. On Energy Policy, Natural Res. and Regulatory Affairs*, 107th Cong. (2002) (statement of Patrick Parenteau, Professor of Law, Vt. Law School) (stating that *Solid Waste Agency* "has created substantial uncertainty regarding the geographic jurisdiction of the Clean Water Act"); see also Editorial, *Saving Wetlands*, WASH. POST, Jan. 18, 2003, at A22 (noting "confusion" in the lower courts and regulatory agencies over the scope of federal regulatory authority under the CWA after *Solid Waste Agency*).

622. See Adler, *supra* note 93, at 59–62.

623. See, e.g., James Andreoni & A. Abigail Payne, *Do Government Grants to Private Charities Crowd Out Giving or Fund-Raising?*, 93 AM. ECON. REV. 792 (2003) (finding government grants to private charities reduce fund-raising by such groups).

624. See *supra* notes 554–63 and accompanying text.

reasonable to expect one or more justices to blink before applying the logic of existing precedents. Yet even if the Court applies the federalism principles in an unflinching manner, it will still be possible to protect environmental values.

Under strict application of *Lopez* and *Morrison*, the federal government will retain the ability to regulate economic activity and truly interstate environmental problems.⁶²⁵ Industrial operations will remain within the federal government's regulatory ambit, as would activities that produce interstate spillovers. Precedents such as *Hodel* would not be threatened by such an approach to the Commerce Clause, nor would lower court decisions upholding federal regulatory statutes that focus on industrial enterprises and other economic activity. Adding a jurisdictional element to even the most ambitious federal environmental statutes would preserve their constitutionality, albeit at the expense of each statute's comprehensiveness.⁶²⁶ A requirement that Congress include jurisdictional elements in environmental statutes that criminalize or otherwise regulate non-commercial activity would still cover the vast majority of environmentally destructive behavior. Commercial real estate developments of the sort at issue in *Rancho Viejo* and *GDF Realty* would satisfy even fairly narrow readings of such requirements, whereas non-commercial activities by individual landowners would not.⁶²⁷

The greatest environmental impact on federal regulatory power would not be the result of an affirmative limitation on congressional power, but rather from the inherent inertia of the legislative process. Were the Supreme Court to find § 9 of the Endangered Species Act to extend beyond the scope of Congress's enumerated powers, it could take some time before Congress amends the statute. The degree of inertia in the legislative process is substantial, and it is far easier to block legislation than to enact it. Still, there is some reason to believe that an urgent need for a new species protection statute could trigger political action.⁶²⁸ Assuming widespread public support for strong federal environmental measures, such legislation would be adopted in relatively short order.

The federal government lacks the power to commandeer state governments for the purposes of implementing federal programs, but state

625. See *supra* Part III.A.

626. See, e.g., *Gibbs v. Babbitt*, 214 F. 3d 483, 508 (4th Cir. 2000) (Luttig, J., dissenting) (noting that "an express interstate commerce jurisdictional requirement" in the ESA "would all but ensure constitutional validity").

627. See *Jones v. United States*, 529 U.S. 848 (2000) (applying the jurisdictional requirement of a federal arson statute).

628. See Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 J.L. ECON. & ORG. 59, 66-67 (1992) (suggesting federal environmental laws adopted during a "republican moment"); see also Christopher H. Schroeder, *Rational Choice Versus Republican Moment—Explanations for Environmental Laws, 1969-73*, DUKE ENVTL. L. & POL'Y F. 29, 43 (1998).

entities are still subject to general federal environmental requirements.⁶²⁹ A state-run facility is still required to meet applicable federal environmental laws. State sovereign immunity limits Congress's ability to authorize citizen suits and contribution actions against state governments, but the federal government retains several means of inducing state compliance with federal law. Sovereign immunity does not prevent the federal government from directly suing state governments, nor does it limit other avenues of relief.

The extent to which the Supreme Court enforces constitutional limitations on the use of conditional spending could have the greatest impact on the federal government's ability to direct environmental policy at the state and local level.⁶³⁰ Yet here too it would be easy to overestimate the likely impact of such rulings. Applying the *Dole* formulation to environmental statutes would curtail federal efforts to coerce state cooperation with the Clean Air Act, but it is unlikely that it would affect other environmental laws. A more stringent spending power doctrine, while unlikely, would certainly constrain federal environmental authority to a greater degree, but the federal government would retain the ability to spend federal funds for environmental purposes. To the extent this compromises environmental protection—, more precisely, to the extent it limits expenditures on environmental measures because environmental programs have difficulty competing against other priorities for a share of the public fisc—this would simply reflect political priorities.

CONCLUSION

The Supreme Court's federalism jurisprudence appears to be on a collision course with large swaths of federal environmental law. While federal courts have yet to curtail federal environmental regulatory authority, the underlying principles of limited and enumerated powers and residual state sovereignty would seem to constraint the federal government's authority in this area. Judicially enforced limits on federal power could well limit federal environmental regulation. Yet, this Article suggests such limits need not come at the expense of environmental protection.

Professor Robert Percival argues that "[t]he Constitution need not stand as an obstacle to environmental progress."⁶³¹ To ensure this result, he suggests a broad reading of the Constitution to incorporate environmental values. But such an approach is not necessary to advance those environmental values held dear by the majority of Americans. Limits on the scope of federal regulatory authority need not be an obstacle to continued environmental progress either. There is more than one way to advance

629. See *supra* Part III.B.

630. See *supra* Part IV.

631. Percival, *supra* note 4, at 870.

environmental values, and not every environmental end—indeed, perhaps not many environmental ends—necessitate a federal solution.

Constitutional limits can often make it more difficult or costly to achieve desired public ends. Presently, there is a vigorous debate about the extent to which the Constitution limits federal efforts to combat terrorism and ensure domestic security. These are unassailable goals, yet it is generally accepted that the Constitution does—and should—constrain the manner in which these goals are pursued. To insist on such limits is not to question the underlying policy goal. This is what it means to have a constitutional government, and it need not result in the sacrifice of important public goals.

The federal government can seek effective ways to prevent terrorism and ensure domestic security while operating within constitutional limits. By the same token, the federal government can seek to ensure continued environmental progress while operating within the constraints imposed by the Constitution. Like domestic security, the goal of environmental protection is unassailable in itself, but the importance of the goal does not justify jettisoning the constitutional baseline. The challenge for the future is to pursue effective environmental protection within constitutional limits.